TRANSCRIPT

SUPREME COURT OF THE UNITED
OCTOBER TERM,
No. 206.

THE NORTHERN PACIFIC RAILROAD
PLAINTIFF IN ERROR,

vs.

DAVID O'BRIEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF

FILED NOVEMBER

(14,425.)

(14,425.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 355.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

DAVID O'BRIEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

UNITED STATES OF AMERICA,
State of Washington, County of Thurston.

I, Sol. Smith, clerk of the supreme court of the State of Washington, and as such custodian of the records, papers, and files of the supreme court of Washington Territory, do hereby certify that the following, hereunto attached, is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by law required on writ of error to transmit to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the seal of said supreme court of the State of Washington this 13th day of October, 1890.

[Seal of the Supreme Court, State of Washington.]

SOL. SMITH,
Clerk of the Supreme Court of the State of Washington.

2 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To David O'Brien, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, to wit, on October 13th, 1890, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein The Northern Pacific Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court of the United States, this 5th day of May, in the year of our Lord one thousand eight hundred and ninety.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the District of Washington.

3 In the Supreme Court of the United States of America.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

STATE OF WASHINGTON, } ss:
County of Yakima, }

Daniel E. Lesh, being sworn, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and is the duly elected and qualified sheriff of Yakima county, in the State of Washington; that he is not interested in or a party to the above-entitled cause, and is competent to be a witness on the trial thereof; that on the sixth day of May, 1890, at the city of North Yakima, in said Yakima county, he served on the above-named defendant in error, David O'Brien, the foregoing citation, filed in this cause with the clerk of the supreme court of the State of Washington, by deliving a true copy of the said citation to J. B. Reavis, attorney for the said defendant in error, David O'Brien, personally in the said city of North Yakima, on the said sixth day of May, A. D. 1890.

DANIEL E. LESH,
Sheriff of Yakima County, Washington.

Subscribed and sworn to before me this sixth day of May, A. D. 1890.

{ Seal George S. Courter, Notary Public, State of Washington. Expiration of Commission, Feb. 9, 1894. }

GEORGE S. COURTER,
Notary Public, Residing at North Yakima, Washington.

3½ [Endorsed:] 604. In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'ff in error, *vs.* David O'Brien, def't in error. Original citation. To be signed by clerk U. S. court. Filed May 5, 1890. Sol. Smith, clerk supreme court State of Washington. Return, with aff. of service.

4 THE NORTHERN PACIFIC RAILROAD CO.,
Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.
#604. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the fourth judicial district of Washington Territory, holding terms at North Yakima, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 7th day of March, A. D. 1889, on motion of J. B. Reavis, of counsel for defendant in error, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed with costs, and that the said David O'Brien, defendant in error, have and recover of and from the said Northern Pacific Railroad Company,

plaintiff in error, the costs of this action, taxed and allowed at — dollars, and that *that* execution issue therefor.

And it is further ordered that this cause be remitted to the said district court for further proceeding, in accordance with the opinion herein filed.

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error. } #604.

The motion of plaintiff in error for leave to file a petition for rehearing in this cause and for the allowance of sixty days within which to file the same and for a stay of all proceedings in this cause, both in this court and in the district court in which said
5 cause was tried, during said time and during the pendency of said petition if filed within said time having this day been brought on to be heard, and the court, being fully advised in the premises, counsel for defendant in error consenting, grants said motion, and it is now, therefore, ordered that plaintiff in error have and hereby is granted leave to file a petition for rehearing herein, and that it be allowed sixty days from this date within which to file the same, and that all proceedings in this cause in this court as well as in the district court in which said cause was tried be stayed during said time allowed for filing said petition and during the pendency of said petition, provided the same is filed within the time allowed by this order.

6 NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error. } #604. Writ of Error to the Fourth District.

Opinion by Chief Justice Burke.

From the undisputed evidence in the record before us in this case it appears that in April, 1887, David O'Brien, the defendant in error, was employed by The Northern Pacific Railroad Company, the plaintiff in error, as a common laborer in the work of "surfacing" its track between Cle-Elum and Martin, in Kittitass county, Washington Territory.

On the 21st of April, 1887, and for some days before that this "surface gang" were engaged at work near a point on the Northern Pacific railroad about six miles west of Cle-Elum, known as Nelson's siding. For some time previous to the 21st of April the "surface gang" were taken to their work every morning from Cle-Elum on a gravel train provided for that purpose by the company; were brought back to Cle-Elum at noon for their dinner; after dinner, usually about 12.45 p. m., they were taken to their work again on the gravel train, and at night the same train brought them back to Cle-Elum. On the 20th of April, 1887, the conductor of the gravel train received his usual orders for the next day's work, directing to work between Cle-Elum and Nelson's siding and to

look out for trains going east. On the 21st of April another train belonging to the same company and consisting of a large, heavy engine intended for mountain-work, a tender, and box car was sent out from Easton as a "wild train," with orders to flag against the gravel train working between Cle-Elum and Nelson's siding. The engine of the wild train was out of repair and so badly disabled that it could neither start up nor start with anything like the promptness of such an engine in good order, and at the time in question was on its way to the company's
7 repair shops at Ellensburgh. The engine was reversing, the tender being in front. By the rules of the company "flagging against other trains" was required to be done by sending a man ahead of the flagging train three-quarters of a mile with danger signals, and the person giving the signals was required to locate himself so as to be plainly seen and to make the signals in such a manner as to be plainly understood. The conductor of the wold train sent a flagman ahead, but, instead of keeping the train three-quarters of a mile behind him, the train followed the flagman so closely that they were not to exceed three to five hundred feet from them. About midway between Cle-Elum and Nelson's siding there is a ten-degree curve, on one side of which is the Yakima river and on the other a rocky bluff of a considerable height; as the flagman turned the western end of this curve, his own train being not more than 300 or 400 feet behind him, he saw the gravel train from Cle-Elum approaching, but owing to the obstructions on the side of the track, which interrupted the view of the engine of the approaching train and the flagman, the signal could not be seen until the train was upon the flagman, and the result was the fatal collision between the two trains. The gravel train consisted of a flat car which was in front of an engine and a caboose car. There were about thirty laborers, including defendant in error, upon the flat car. This flat car was driven by the force of the collision into the tender of the engine of the other train; seven men were killed outright and more or less seriously injured. The defendant in error was hurled from the car by the shock of the collision, falling upon his head upon the rocks upon the bank of the river some fifteen or twenty feet from the track; when found he was unconscious; his head was badly cut, one of his teeth knocked out, his right clavicle was broken; he was badly bruised and lacerated on other parts of his body. The collision occurred between 12.50 and 1 o'clock in the afternoon of the 21st; so far there is no dispute as to the facts. The evidence as to the rate of
8 speed at which the gravel train was running at the time of the collision was somewhat conflicting, some of the witnesses putting it as high as thirty-five miles an hour and some as high as twelve miles an hour. To our minds the evidence warrants the belief that the train was running at about eighteen miles an hour, the highest rate of speed allowed by the rules of this company. The evidence moreover clearly shows that the flat car was designed for the laborers to ride upon to and from their work, and that the caboose was reserved for the use of the trainmen. That this

disastrous collision was caused by the gross negligence of the conductor and engineer of the train going down to Ellensburgh—that is, the "wild train"—there can be no doubt whatever. It would be difficult to conceive of a case of more wanton, inexcusable negligence than that of which the conductor and engineer of that train were guilty. They must have known from the time they left Nelson's siding that the gravel train was then on its way from Cle-Elum carrying laborers to their afternoon work, and that the two trains must inevitably meet somewheres on that six-miles stretch. Yet, with this knowledge and in direct violation of the rules of the company and of ordinary prudence, they ran their train over the sharpest curve on the line, leaving the flagman only three hundred feet ahead of them to warn the approaching train of the danger. Exceptions have been taken to the instructions of the court below on this head, and, as counsel for the plaintiff in error has laid great stress upon this exception, we give the instruction complained of:

"The train with which Hulett's train collided and which had orders to flag against Hulett's train had no business to be where it was at the time of the collision. It should have remained at the point where the flagman was put off and sent forward until he had procured a sufficient distance forward to guard against accidents, but instead of that the train followed behind the flagman only a few hundred feet and was thereby placed in a position where it was impossible to prevent a collision with the train which came
9 dashing around the curve with its load of human freight ignorant of its impending danger.

This was gross negligence on the part of those in charge of said train, and, the facts being undisputed, it is the duty of the court to tell you so and not to confuse you with abstract definitions of negligence which you may not understand alike and may therefore have difficulty in applying."

We think the instructions correctly stated the law applicable to the facts of this case. Negligence is a question of mingled law and fact; where there is any conflict in the evidence the question is submitted to the jury under proper instructions, but whether a given state of facts constitutes negligence in any case is the question of law for the courts. In this case, as we have seen, the facts which are alleged to constitute the negligence were established by undisputed evidence. In such case it becomes the duty of the court to declare as a matter of law whether the facts constitute negligence.

1 Sherman and Redfield on Negligence, secs. 52, 53, & 56.
Dascomb *vs.* Buffalo, etc., R. Co., 27 Barb., 221.
Catawissa R. Co. *vs.* Armstrong, 52 Penn St., 282.
Carter *vs.* Tome, 103 Mass., 507.

This the court did in language to which, indeed, exceptions have been taken, but which, though open to criticism, does not furnish ground for the reversal of the judgment below. The court in subsequent parts of the charge qualified and restrained the force of his words in the instruction and particularly cautioned the jury

against prejudice or passion in making up their verdict; but, admitting the collision was caused by gross negligence of the conductor and engineer of the wild train, it is contended on behalf of the plaintiff in error that under the rule which exempts the master from liability to a servant from injuries caused by negligence of a fellow-servant in the same common employment the railroad company cannot be held responsible to the defendant in error in this case.
10 This, it seems to us, presents the only question of real difficulty in this case.

If the conductor and engineer were fellow-servants of the laborers working on the track and engaged in the same common employment, then the company is not liable to the defendant in error for the injuries he received in the collision. The general rule of law on this subject is well settled, but as it was interpreted in the Farwell case, 4 Met., 49, and in other cases following the Farwell case, its injustice long ago became so manifest and was so frequently dwelt upon both by text writers and courts that in recent years the courts have shown a strong tendency to graft important limitations upon the general doctrine. In some of the States the legislatures have abolished the rule altogether, and in England the rule was carried to such an extent that in 1880 Parliament felt called upon to interfere and the result was the "employer's liability act." It is not, however, our purpose to review the authorities upon this rule or to discuss it at any length, for we think that the recent decisions of the Supreme Court of the United States upon this subject are decisions of this case, and, as the amount involved is large enough to bring the case within the jurisdiction of that court, if we err in our decision we have no doubt the losing party will take the case to the Supreme Court for review and correction. In our view, then, of the law the conductor and engineer of the "wild train" were not fellow-servants of the laborer O'Brien, the defendant in error in this case, or engaged in the same common employment with him. One of the rules of the Northern Pacific Railroad Company expressly provided that "trains are to be run under the direction of the conductor, except when such direction conflicts with these rules or involves risk or hazard, in which case the engineer will be held equally responsible." These men were not only engaged in totally different departments of work, but they stood in a different relation to their common principal. The conductor and engineer were agents of the corporation clothed with the control and man-
11 agement of a distinct department of the business of the company. They had on this occasion the entire control and management of the train and were to all intents and purposes the personal representatives of the company for whose negligence it is and ought to be responsible to the defendant in error and other subordinates similarly employed. On page 394 the court in C., M. & St. P. R'y Co. *vs.* Ross used this language:

"The conductor of a railway train who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it represents the company, and

therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

Chicago, M. & St. P. Co. *vs.* Ross, 112 U. S., 377.

The case then stands the same as it would if the president of the company or the board of directors were on the train commanding and directing its movements and committing the *acts* of gross negligence here imputed to the conductor and engineer. No one questions that when the master himself is guilty of negligence resulting in an injury to one of his servants that the master is responsible for such injury. An attempt has been made here to distinguish the case at bar from Railway *vs.* Ross by the circumstance that in the latter case the injury was caused by the conductor of the train on which the injured person was employed at the time, whereas in the case at bar the person whose negligence caused the injury was conductor of another train and not of the train on which the injured person was riding. We can see no difference in principle between the cases. In each case the party guilty of negligence stood as vice-principal. He represented the company. He was engaged in a totally different department of labor from that in which defendant in error was employed, and he stood in a very different relation to their common principal.

12 N. P. R. R. Co. *v.* Herbert, 116 U. S., 642.
Cunard Steamship Co. *v.* Carey, 119 U. S., 245.

We will now briefly notice the other exceptions relied upon by plaintiff in error to reverse the judgment of the court below.

The court below charged the jury that the burden of proof as to contributory negligence rested upon defendant; to this the defendant excepted. We think that the charge of the court upon this point was a correct statement of the law. It is true that in some States a different doctrine prevails, but in our view the better reason, as well as the weight of authority, is with the courts holding that the burden of proof is upon the defendant to show contributory negligence upon the part of the plaintiff in cases of this character.

I Shannon and Redfield on Negligence, 4th ed., secs. 108, 109.
Hough *v.* Railroad Co., 100 U. S., 213.
N. P. R. R. Co. *v.* Mass., 123 U. S., 710, 721.
Indianapolis R. R. Co. *v.* Holst, 93 U. S., 291.
R. R. Co. *v.* Gladmon, 15 Wall., 401.

Exception was taken by the plaintiff in error to the admission of evidence under the complaint tending to show defects in the engine, and also to the admission of evidence introduced to show what defendant in error had been "working at prior to the collision and what wages he had generally received." The object of this latter testimony was to furnish some basis for the estimation of the damages which defendant in error claimed to have suffered. We do not think the exceptions were well taken in either case. The alle-

gations in the complaint were broad enough to cover such testimony; even if they were not, this would furnish no ground of exception in view of section 105 of our code. We find no error in the record, and the judgment of the district court is therefore affirmed.

THOMAS BURKE,
Chief Justice.

I concur.
WM. G. LANGFORD,
Asso. Justice.

13 *Opinion by Allyn, Asso. Justice.*

I do not concur in the opinions filed herein. While the result may be justified by the facts of this particular case, I cannot approve of certain of the instructions as set out in the opinion. I doubt greatly the propriety of the court assuming to take the question of negligence from the jury. The case should be very exceptional where this may be done at all, and in this case the result of this was to ignore all explanation offered and excuse presented as insufficient, on the sufficiency of which I feel the jury may much more safely pass than the court.

But the language and manner of the instruction (being the instruction first quoted in the opinion) is certainly subject to criticism. In this class of cases (personal injury) jurors are ordinarily ready enough to see these features, and need no graphic picture of the scene in the charge. The court cannot too carefully avoid language which may imply to the jury possible feeling, or in the most remote way (though not intended) influence them. The tendency of courts to refer to and comment on the evidence and thus take from the jury that which is exclusively given to their keeping cannot be too carefully avoided or too strongly guarded against. In my judgment the choice of terms by the lower court was (that to which I have referred) unfortunate and properly subject to criticism, while I am equally satisfied they were not so intended and merely the result of oversight incident to a necessarily hasty consideration at the trial of a very large number of instructions, as may not unfrequently happen.

FRANK ALLYN,
Asso. Justice.

(Filed March 8th, 1889.)

14 NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error. } # 604.

Decision of the supreme court of the Territory of Washington having been heretofore, on the 7th day of March, 1889, rendered in the above-entitled cause in favor of the defendant in error, affirming the judgment of the district court of the fourth judicial district of Washington Territory, holding terms at North Yakima, in the

county of Yakima, and on the said day an order having been made by said supreme court, counsel for the defendant in error consenting, giving plaintiff in error sixty days' time within which to file a petition for rehearing, and staying all proceedings on said judgment in said court as well as in said district court during the time provided for the filing of said petition and during the pendency thereof, and the said supreme court having on said day made an order granting plaintiff in error, in the event of the denial of said petition when the same should be heard and determined, a period of sixty days within which to perfect proceedings upon appeal to the Supreme Court of the United States, and providing a stay of proceedings as before during the said period of sixty days, and the said petition having been filed within the time provided by the order of said court and having been pending undetermined at the time of the admission of the State of Washington and the organization of this the supreme court of said State, and this court having directed the defendant in error to answer said petition, the said answer having been filed within the time provided by said order, and said petition and answer having been taken under advisement by this court, now, on this 8th day of March, A. D. 1890, the court, being fully advised in the premises, denies said petition for rehearing; to which ruling and judgment, as well as the judgment of the supreme court of said Territory affirming the judgment of said district court, plaintiff in error, by its counsel, excepts, and said exception is allowed; and now, on this 8th day of March, 1890, the motion of plaintiff in error for the allowance of a writ of error to the Supreme Court of the United States and the granting of a supersedeas thereon in the above-entitled cause having been on this day brought on to be heard and it now, on the same day, appearing to the court from the affidavit of John H. Mitchell, Jr., counsel for plaintiff in error, and from the papers, records, and files in this cause that the value of the matter in dispute in the above-entitled cause exceeds the sum of five thousand dollars, exclusive of costs, and the court, being otherwise fully advised in the premises, grants said motion:

Now, therefore, it is ordered by the court that a writ of error to the Supreme Court of the United States to the judgment of the supreme court of the Territory of Washington, now a record of this court, and to the judgment, order, and ruling of this court upon the petition for rehearing be, and hereby is, allowed.

And it is further ordered that the plaintiff in error be, and hereby is, given and allowed sixty days from this date within which to file a supersedeas bond and security for the prosecution of said writ of error, and that said supersedeas bond be, and hereby is, fixed at the sum of twelve thousand dollars.

And it is further ordered that all proceedings upon the judgment heretofore rendered in this cause by the supreme court of said Territory and upon the orders made in this court in pursuance thereof, as well as all proceedings in this cause in the district court of said Territory heretofore referred to or such superior court as has by operation of law become the successor of said district

court, be, and hereby are, stayed during said time allowed for the filing of said bond, and that upon the filing of the said bond all said proceedings be stayed during the pendency of said writ of error, provided said bond is filed within the time required by this order.

And it is further ordered that the Honorable T. L. Stiles, judge of the supreme court of the State of Washington, be, and hereby is, designated as the judge who shall take and approve the security which shall operate as a supersedeas upon the suing out of said writ of error and who shall issue the citation upon said writ of error.

17 & 18 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

STATE OF WASHINGTON, *County of Thurston,* } *ss:*

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says that he is one of the attorneys for the plaintiff in error in the above-entitled cause; that he has been an attorney in said cause ever since action therein was commenced and during its pendency in the several territorial and State courts; that he is familiar with the matter in dispute in said action; that the value of the matter in dispute in said action exceeds the sum of five thousand dollars, exclusive of costs; that this is a cause in which the judgment, on which a writ of error is sought to be prosecuted, was rendered by the supreme court of the Territory of Washington, and is a cause which arose within the limits of said Territory of Washington prior to the admission of the State of Washington.

JOHN H. MITCHELL, JR.

Subscribed and sworn to before me this 8th day of March, 1890.

SOL. SMITH,
Clerk Supreme Court of Washington.

19 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error. } Bond.

Know all men by these presents that we, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled cause, by Charles H. Prescott, its second vice-president and attorney-in-fact, and C. W. Griggs and A. W. Foster, of Tacoma, Pierce county, Washington, are held and firmly bound unto David O'Brien, of North Yakima, in the State of Washington, the defendant in error in the above-entitled action, in the sum of twelve thousand

dollars ($12,000.00) to be paid to the said David O'Brien, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, as well as the successors and assigns of said railroad company, firmly by these presents.

Sealed with our seals and date- this fifth day of May, A. D. 1890.

Whereas the above-named Northern Pacific Railroad Company has presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Washington:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute its writ of error to effect and answer all costs and damages if it fail to make good its plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By CHARLES H. PRESCOTT, [SEAL.]
Its Second Vice-president and Attorney-in-fact.

20 Northern Pacific Railroad Co.'s office.

No. 35 WALL STREET,
NEW YORK CITY, *March 5th*, 1889.

I, Samuel Wilkeson, the secretary of the Northern Pacific Railroad Company, certify that the annexed is a true copy from the minutes, by me kept as such secretary, of a meeting of the board of directors of said company duly held on the 21st day of February, 1889, and that a resolution, of which the annexed is a copy, was on that day unanimously adopted by said board of directors; and to this certificate, for verification, I affix the corporate seal of said company.

[CORPORATE SEAL.] SAM'L WILKESON,
Secretary N. P. R. R. Co.

(*Resolution.*)

Resolved, That Charles H. Prescott, of Tacoma, Washington Territory, be, and he is hereby, authorized and empowered to execute, under seal or without seal, as may be required, and deliver for and in the name of this company any and all bonds or undertakings which may be required to be executed by or for this company in any and all legal proceedings now pending or that may hereafter be commenced in any court in the State of Oregon or in the Territory of Washington or in the Territory of Idaho according to law or the rules and practice of any such court, including all bonds or undertakings necessary to be given by this company on appeal to the higher courts of said State or Territories or to the Supreme Court of the United States, and that the secretary deliver to the

said Charles H. Prescott four copies of this resolution, duly certified.

21 C. W. GRIGGS. [SEAL.]
A. G. FOSTER. [SEAL.]

Sealed and delivered in the presence of—
JOHN H. MITCHELL, JR.
WALTER LOVEDAY.

STATE OF WASHINGTON, } ss:
County of Pierce, }

C. W. Griggs and A. G. Foster, being each first duly sworn, upon oath deposes and says, each for himself, that he is one of the sureties named in the above and foregoing bond; that he is a resident of the State of Washington, and that he is worth the sum of twelve thousand (12,000) dollars over and above all debts and liabilities and property exempt from execution.

C. W. GRIGGS.
A. G. FOSTER.

Subscribed and sworn to before me this fifth day of May, 1890.
WALTER LOVEDAY,
[NOTARIAL SEAL]. *Notary Public in and for the State of Washington, Residing at City of Tacoma, Pierce County, said State.*

Taken before and approved by me this fifth day of May, A. D. 1890.
T. L. STILES,
Associate Justice of the Supreme Court of the State of Washington.

(Endorsed:) In the Supreme Court of the United States. Northern Pacific Railroad Co., pl'ff in error, *vs.* David O'Brien, d'f't in error. Bond on suing out writ of error for operation as supersedeas. Filed this 6th day of May, 1890. Sol. Smith, clerk supreme court State of Washington. Mitchell, Ashton & Chapman, att'ys for pl'f in error.

22 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

UNITED STATES OF AMERICA, ss:

To David O'Brien, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1889, to wit, on October 13th, 1890, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein The Northern Pacific

Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand this 5th day of May, A. D. 1890.

T. L. STILES,
Associate Justice, Supreme Court of Washington.

In the Supreme Court of the United States of America.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

STATE OF WASHINGTON, *County of Yakima*, } ss:

Daniel E. Lesh, being duly sworn, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and is the duly elected and qualified sheriff of Yakima county, in
23 the State of Washington; that he is not interested or a party to the above-entitled cause, and is competent to be a witness on the trial thereof; that on the 6th day of May, 1890, at the city of North Yakima, in said county of Yakima, he served on the above-named defendant in error, David O'Brien, the foregoing citation filed in this cause with the clerk of the supreme court of the State of Washington, by delivering a true copy of the said citation to J. B. Reavis, attorney for the said defendant in error, David O'Brien, personally, in the said city of North Yakima, on said sixth day of May, A. D. 1890.

DANIEL E. LESH,
Sheriff of Yakima County, Washington.

Subscribed and sworn to before me this sixth day of May, A. D. 1890.

[NOTARIAL SEAL.] GEORGE S. COUNTER,
Notary Public, Residing at North Yakima, Washington.

(Endorsed:) 604. In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'ff in error, *vs.* David O'Brien, def't in error. Citation. Filed May 5, 1890. Sol. Smith, clerk supreme court State of Washington.

24 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

Of October term, in the year of our Lord one thousand eight hundred and ninety.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United

States, at the Capitol, in the city of Washington, comes the said Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings aforesaid there is manifest error, to wit:

That the supreme court of the Territory of Washington erred in affirming the judgment of the district court of the fourth judicial district of Washington Territory, holding terms at North Yakima, in and for the county of Yakima; that the affirmance of said judgment was error because of the errors in the record and proceedings of said district court in the course of the rendition of said judgment by said court; which said errors remain uncorrected by the judgment of said supreme court of said Territory; and the said judgment of affirmance, therefore, was and is erroneous for and by reason of this, to wit:

25 First. There was error committed in permitting the witness J. A. Quinn, over the objection of the plaintiff in error, to answer the following question, to wit, "You may state if there was any defect about the engine," for the reason that the question was and is immaterial, no question as to defect of machinery being raised by the pleadings and no negligence other than negligence in the operation of trains being alleged in the complaint.

Second. It was error to permit said witness Quinn to answer, over the objection of the plaintiff in error, the following question, to wit, "What was the difference between her working then and the way she generally worked?" for the reason that the question was and is immaterial, no question as to defect of machinery being raised by the pleadings and no negligence other than negligence in the operation of trains being alleged in the complaint.

Third. It was error to permit said witness Quinn to answer, over the objection of plaintiff in error, the following question, to wit, "How long would it take to start her one way or the other?" for the reason that the question was and is immaterial, no question as to defect of machinery being raised by the pleadings and no negligence other than negligence in the operation of trains being alleged in the complaint.

Fourth. It was error to permit the witness Gardner to answer, over the objection of the plaintiff in error, the following question, to wit, "Now, how much was this engine disabled by the springing of the eccentric blade?" for the reason that the question was and is immaterial, no question as to defect of machinery being

26 raised by the pleadings and no negligence other than negligence in the operation of trains being alleged in the complaint.

Fifth. The giving of the following instruction was error, "While said conductor and engineer were, in a sense, fellow-servants with the plaintiff in the employ of the defendant, they were, in another sense, agents of the corporation, clothed with the control and management of a distinct department of the business of the defendant, and are, therefore, to be treated as the personal representatives of the defendant, for whose negligence it is responsible to subordinate servants," for the reason—

A. That under the law or rule of decision then in force in the Territory of Washington the said conductors and engineers were not vice-principals or personal representatives of the plaintiff in error, but fellow-servants with the defendant in error, for whose negligent or careless act the plaintiff in error is not under any liability to the defendant in error, and that said instruction does not correctly state the law or rule of decision then in force in the Territory of Washington with respect to the relations of master and servant.

B. That it does not appear by the testimony or anything shown in the case that the conductor and engineer had any control or management of any department of the business of the plaintiff in error, and there was not anything involved in the case, either by way of fact or of law, to authorize or justify the conclusion that they had any control or management or were in any sense agents of the corporation.

Sixth. The giving of the following instruction was error, to wit,

"This being true, the defense set up by the defendant that
27 plaintiff was injured through and by the negligence of his fellow-servants fails," for the reason that under the law and rule of decision then in force in the Territory of Washington establishing the relations of master and servant and declaring the relative duties, rights, and liabilities thereof the defense so set up by the plaintiff in error was fully maintained by the evidence, and the jury should have been so instructed.

Seventh. The giving of the following instruction was error, to wit, "But if the caboose was attached to the train for the accommodation of the trainmen alone, the flat car being provided for the gang of track workmen, or if the servants of the company in charge of the train directed the workmen to take positions on the flat car, then they were not guilty of negligence in obeying that direction and riding on said car, and of course the plaintiff, being one of said workmen, was not guilty of contributory negligence in that particular," for the reason that any direction of the servants of the company in charge of the train, in the particular mentioned, would not relieve the person obeying such direction from the effect of his own negligence in doing the act.

Eighth. It was error to refuse to give the following as an instruction to the jury, to wit, "That the plaintiff was at the time of the collision a fellow-servant and coemployé of the engineers and conductors of the colliding trains, who were engaged in a common employment with him, and that if the jury should find from the evidence that said collision occurred through the negligence of said conductors and engineers or the negligence of the conductor or engineer of either of said trains or the neligence of either
27½ the said conductor or engineer of either of said trains and that the plaintiff was injured thereby that in that case the defendant would not be liable to plaintiff for said injury," for the reason that the statement of law therein contained was the law and rule of decision then in force in the Territory of Washington.

Ninth. It was error to refuse to give the following as an instruction to the jury, to wit, "The plaintiff cannot recover for any neg-

ligence other than that alleged in his complaint; that the allegations of plaintiff's complaint are not sufficient to cover any negligence of defendant except negligence in the operation of its trains, and that there can be no recovery unless negligence of the defendant in the operation of its trains is proven by a preponderance of the evidence," for the reason that the defendant in error is required to enumerate in his complaint every class of negligence upon which he relies as the basis of his action and cannot rely upon any other than that which is stated in his complaint.

Tenth. The rendition and entering up of judgment by the said district court of said Territory in favor of the defendant in error and against the plaintiff in error was an erroneous action because of the errors in the records and proceedings which resulted in said judgment.

28 And the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment aforesaid of the supreme court of the Territory of Washington may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

JAMES McNAUGHT,
Attorney for Plaintiff in Error.

29 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in error.
} Præcipe.

To Sol. Smith, clerk of the supreme court of the State of Washington and, as such, custodian of the records of the supreme court of Washington Territory:

You are hereby directed to annex to the writ of error heretofore sued out in the above-entitled cause an authentic transcript of the record, together with the assignment of errors and prayer for reversal, and also the citation to the defendant in error, and return the same, with said writ of error, at the day and place therein mentioned, transmitting the same to James H. McKenney, clerk of the Supreme Court of the United States.

You will include in said transcript the following, to wit:

1. Writ of error (original).
2. Judgment of supreme court of Washington Territory, with order granting time to file petition for rehearing and staying proceedings.
3. Opinion of court.
4. Order denying petition for rehearing, allowing writ of error, fixing bond, staying proceedings, and naming judge to issue citation.
5. Affidavit showing value of matter in dispute.
6. Bond.
7. Citation.

8. Assignment of errors and prayer for reversal.
30 9. Præcipe.
10. Complaint.
11. Answer.
12. Reply.
13. Verdict.
14. Judgment on verdict.
15. Notice of appeal to supreme court of Territory, with assignment of errors.
16. Bill of exceptions.
17. Certificate of clerk of territorial district court.
18. Certificate of clerk of State supreme court.

JAMES McNAUGHT,
Attorney for Plaintiff in Error.

31 In the District Court of the Fourth Judicial District of the Territory of Washington, Holding Terms at North Yakima, in and for Yakima County.

DAVID O'BRIEN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Complaint.

The plaintiff complains and alleges:

1. That on the twenty-first day of April, 1887, the defendant was a corporation duly incorporated under and pursuant to the laws of the United States and was owner of a certain railroad running through Yakima and Kittitass counties, Washington Territory, together with the track, cars, and locomotives thereto belonging, and was running locomotives and cars on its said railroad.

2. That the said plaintiff was employed by the defendant as a common laborer on said railroad at and for a certain hire and reward agreed upon by the parties in that behalf, and while so employed on the said 21st day of April, 1887, under and by direction of the defendant, got onto a certain flat car of the defendant, which said flat car was attached to and placed before a locomotive to be conveyed from the station of Cle-Elum, on said railroad, to a point on said railroad about five miles from said station, where plaintiff was working for defendant.

3. That while plaintiff was so being conveyed to his work by the defendant and about two and a half miles from said station of Cle-Elum, in said Kittitass county, a collision occurred on the said railroad between said work train on which plaintiff was being
32 so conveyed and a locomotive and tender coming from an opposite direction under authority and direction of defendant and meeting the said work train, which collision was caused by the gross negligence and carelessness of the defendant and its servants, and the plaintiff was thereby greatly injured; that his ribs were broken, his shoulder broken, and his head and spine were bruised and fractured and other parts of his body were bruised and fractured, from which injuries he suffered intense and long-continued pain

and still suffers great pain and will always continue to suffer great pain, and was permanently disabled from following his occupation and rendered unable to earn a livelihood for himself.

4. That by the said negligent, careless, and wrongful acts of the defendant and its servants plaintiff has been damaged in the sum of ten thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, together with his costs and disbursements in this action.

REAVIS, MIRES & GRAVES,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Kittitass, } *ss:*

David O'Brien, being first duly sworn, on oath says that he is the plaintiff in this action; that he has heard read the foregoing complaint, knows the contents thereof, and that the same is true, as he verily believes.

DAVID O'BRIEN.

Subscribed and sworn to before me this 27th day of June, 1887.

A. MIRES,
[SEAL.] *Notary Public.*

33 (Endorsement:) In the district court, 4th judicial district, Yakima county, Washington Territory. David O'Brien *vs.* Northern Pacific Railroad Company. Complaint. Filed June 27, 1887. D. A. Clement, clerk, by R. Strobach, deputy. Reavis, Mires & Graves, attorneys for plaintiff.

34 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in and for Yakima County.

DAVID O'BRIEN, Plaintiff, }
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Defendant for answer to the complaint of the plaintiff says:

1st.

That it denies each and every allegation of the second paragraph of plaintiff's complaint except that defendant at the time of the accident hereinafter mentioned was in the employ of the defendant, engaged to perform work and labor upon the construction and repair of defendant's railroad at and for a certain hire and reward agreed upon by the parties in that behalf, and that at said time while so employed defendant was on a work train of defendant going from the station of Cle-Elum, on said railroad, to a point on said railroad where plaintiff was working for defendant, which defendant admits.

Second.

That it denies each and every allegation of the third paragraph of said complaint except that on the 21st day of April, 1887, while defendant was on said work train going to the place aforesaid an accident in the nature of a collision between said work train and a locomotive and tender, with caboose attached, used in connection with the construction and repair of said road, coming from an opposite direction, occurred on said defendant's railroad without any fault of the defendant, and that plaintiff was injured in said collision, which defendant admits; but as to the extent and nature
35 of plaintiff's injuries and as to whether said plaintiff was injured by reason of said collision plaintiff has not knowledge or information sufficient to form a belief. As to whether plaintiff suffered intense or long-continued pain by reason of or as the result of any injuries received in said collision defendant has not any knowledge or information sufficient to form a belief; denies that plaintiff suffers great pain or any pain by reason of any injury received in said collision; denies that he will suffer any pain at all from or by reason of said injury; denies that plaintiff was permanently disabled or disabled at all from following his occupation; denies that plaintiff was rendered unable to earn a livelihood for himself.

Third.

That it denies each and every allegation of the fourth paragraph of said complaint; denies that defendant has been damaged in the sum of ten thousand dollars or in any sum whatever, or damaged at all by any act of the defendant.

And for a first affirmative defense defendant avers:

1st.

That whatever injuries were received by the plaintiff they were received without any fault, negligence, or carelessness of the defendant, but by the negligence and carelessness of the plaintiff himself, and his negligence and carelessness and the acts and conduct of his fellow-servants, for which defendant is not liable, contributed to the same.

2nd.

That at the time of said accident and injury the railroad of defendant was in process of construction from said Cle-Elum to and over the Cascade mountains, and the said defendant was not at said time nor at any time previous thereto operating said railroad west of said Cle-Elum, and was not running any trains over the same except for construction purposes, and that all persons
36 upon the trains heretofore mentioned and connected in any way with the operation thereof at the time of said accident were fellow-servants of the plaintiff employed in the work of constructing said road, and whatever carelessness or negligence contributed to said injury was the carelessness and negligence of said plaintiff and said fellow-servants.

And for a further affirmative defense defendant avers:

That prior to the commencement of this action the plaintiff entered into an agreement with the attorneys who appear for him and who have filed the complaint in this action in his behalf, namely, the firm designated in and who have signed their names to the complaint herein as Reavis, Mires & Graves, to pay to said firm a portion of such sum as shall be recovered in this action in consideration of the services rendered and to be rendered by the said attorneys in the commencement and prosecution of this case on behalf of plaintiff, and by said agreement the payment of the sum so to be paid as aforesaid is made contingent upon the recovery which shall be made in this case; that this agreement is still in force between said plaintiff and his said attorneys.

Wherefore defendant prays it may go hence without day and have judgment for its costs.

McNAUGHT & MITCHELL,
Attorneys for Defendant.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

John H. Mitchell, Jr., being first duly sworn, upon oath deposes and says he is one of the attorneys for the defendant in the above-entitled action; that he has heard read the foregoing answer, knows the contents thereof, and believes the same to be true; that affiant makes this affidavit because defendant is a corporation and
37 has no officer or agent now in said county authorized to make the same.

JOHN H. MITCHELL, JR.

Subscribed and sworn to before me this 16th day of July, 1887,
W. O. CHAPMAN,
Notary Public.

(Endorsement:) No. 616. In the dist. court of the fourth judicial dist. of Washington Territory, holding terms at North Yakima, in and for Yakima county. David O'Brien, plaintiff, *vs.* The Northern Pacific Railroad Company. Answer. Filed July 19th, 1887. D. A. Clement, clerk, by Wm. F. Prosser, deputy.

38 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in and for Yakima County.

DAVID O'BRIEN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Reply.

The plaintiff replying to the affirmative defenses of defendant's answer: To the first paragraph of the first affirmative defense of said answer, plaintiff denies that he, by his acts or negligence, contributed to the injuries received by him as alleged in the complaint, or that he in any manner or at all contributed to the same; plain-

tiff denies that the acts, conduct, and negligence of his fellow-servants contributed — or caused his said injuries in any manner or at all.

To the second paragraph of said affirmative defense plaintiff denies each and eve-y allegation therein contained.

Plaintiff, replying to the second affirmative defense of said answer, denies each and every allegation therein contained.

REAVIS, MIRES AND GRAVES,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Kittitass, } *ss:*

David O'Brien, being first duly sworn, says: I am the plaintiff in the above-entitled action and have heard read the foregoing reply and know the contents thereof, and the same is true, as *he* believes.

DAVID O'BRIEN.

39 Subscribed and sworn to before me this 1st day of Aug., 1887.

A. MIRES,
[SEAL.] *Notary Public.*

(Endorsement:) In district court, North Yakima. David O'Brien, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant. Reply. Filed Aug. 2nd, 1887. D. A. Clement, clerk, by Wm. F. Prosser, deputy. Reavis, Mires & Graves, attorneys for plaintiff.

40 Tenth Judicial Day, Oct. 20th, 1887.

DAVID O'BRIEN, Plaintiff, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant.	616. Jury Render Verdict in Favor of Plaintiff for $6,000.00.

Now, on this day, comes the jury, heretofore retired in charge of a sworn officer of this court, to consider of their verdict in this cause, and being called in open court all answer to their names in their box, and plaintiff being present by his attorneys, Messrs. Reavis, Mires and Graves, and defendant by its attorney, J. H. Mitchell, Jr., the jury renders the following verdict:

"We, the jury in the case of David O'Brien against the Northern Pacific Railroad Company, find for the plaintiff for $6,000 *dollars.*

DAVID LONGMIRE, *Foreman.*"

Which verdict is received by the court and ordered filed with the clerk, and thereupon the jury is discharged from the further consideration of this cause.

41 Eleventh Judicial Day, October 21st, 1887.

DAVID O'BRIEN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
616. Judgment on Verdict.

On this 21st day of October, A. D. 1887, the eleventh judicial day of the term, the motion of the defendant to set aside the verdict and for a new trial in this cause coming on regularly for hearing, the said parties appeared by their attorneys, Messrs. Reavis, Mires & Graves, for the plaintiff, and Messrs. J. H. Mitchell and N. T. Caton, for the defendant, and the court, being fully advised in the premises, overrules said motion, to which defendant excepted and which exception was allowed, and upon motion of plaintiff's said attorneys for judgment in said cause on the verdict of the jury heretofore received and filed herein.

Therefore, by reason of the premises aforesaid, it is considered, ordered, and adjudged and declared that said plaintiff, David O'Brien, have and recover of and from said defendant, The Northern Pacific Railroad Company, the sum of six thousand dollars ($6,000.00), with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, to be taxed, and that execution issue therefor.

42 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in and for Yakima County, W. T.

DAVID O'BRIEN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the clerk of the above-named court and to the plaintiff, David O'Brien, and his attorneys:

You and each of you are hereby notified that the Northern Pacific Railroad Company appeals and prosecutes a writ of error to the next regular term of the supreme court of Washington Territory, which said term commences on Monday, the 7th day of January, A. D. 1889, from the judgment entered and made in the above-entitled cause and court on the 21st day of October, A. D. 1887, particularly described as follows, to wit, a judgment in favor of the plaintiff, David O'Brien, for the sum of six thousand ($6,000) dollars and costs against the Northern Pacific Company for damages for personal injuries to said O'Brien by said defendant, which said judgment was entered in the judgment record of said court on the 21st day of October, A. D. 1887, and which judgment is in the words and figures following:

"In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in and for Yakima County, W. T.

DAVID O'BRIEN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Judgment on Verdict.

On this 21st day of October, A. D. 1887, the eleventh judicial day of the term, the motion of the defendant to set aside the verdict and for a new trial of this cause coming on regularly for
43 hearing, the said parties appeared by their attorneys, Messrs. Reavis, Mires & Graves, for the plaintiff, and Messrs. J. H. Mitchell, Jr., and N. T. Caton, for the defendant; and the court, being fully advised *the* the premises, overrules said motion, to which defendant excepts, and which exception was allowed, and upon motion of plaintiff's said attorneys for judgment in said cause on the verdict of the jury heretofore received and filed herein.

Therefore, by reason of the premises aforesaid, it is considered, ordered, and adjudged and declared that said plaintiff, David O'Brien, have and recover of and from said defendant, The Northern Pacific Railroad Company, the sum of six thousand ($6,000) dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in -his action, to be taxed, and that execution issue therefor.

GEORGE TRUNER,
Judge of said Court.

Dated October 21st, 1887."

That this appeal and writ of error is taken from each and every part of said judgment, and each and every order, ruling, and decision made in said case.

Description of Errors.

The Northern Pacific Railroad Company, for a particular description of errors assigned, avers and assigns:

I.

Error of the court in permitting the witness J. A. Quinn over the objection of the defendant to answer the following question, to wit, "You may state if there was any defect about the engine," for the reason that the question is immaterial, no negligence other than the operations of trains being alleged in the complaint.

44 2.

In permitting the witness Quinn to answer over the objection of the defendant the following question, to wit, "What was the difference between her working then and the way she generally worked?"

for the reason that the question is immaterial, no defect in the working of the engine being alleged in the complaint as the basis of action.

3.

In permitting the witness Quinn to answer over the objection of the defendant the following question, to wit, "How long would it take to start her one way or the other?" for the reason that the question is immaterial, no question as to difficulty in starting or stopping engine being raised by the pleading.

4.

In permitting witness W. H. Bowman to answer over the objection of defendant the following question, to wit, "Now what speed was she running when she went around that curve?" for the reason that the same is immaterial, no particular rate of speed having been proved as dangerous or unlawful under the circumstances of the case.

5.

In permitting the plaintiff to answer over the objection of defendant the following question, to wit, "What had you been working at and what had your pay generally been for?" for the reason that there is no allegation in the complaint of any special damage or any special allegation of damage by reason of the loss of the power to earn money or to follow any particular occupation.

6.

Permitting the plaintiff to answer over the objection of defendant the following question, to wit, "You may state if you were able to perform work all the time," for the reason that there is no allegation in the complaint of special damage or special allegation of damage resulting from any inability to perform work.

7.

In refusing to allow plaintiff to answer the following question, to wit, "I will ask you, Mr. O'Brien, if you have any agreement with your attorneys, Reavis, Mires & Graves, or either of them, by the terms of which they are to receive a percentage of any recovery you may make in this case?" for the reason that said question was material, as such agreement, if shown to exist, would be a champertous contract and contrary to law and public policy.

8.

In permitting the witness Gardner to answer over the objection of the defendant the following question, to wit, "What for?" (referring to the place where the engine was being taken) for the reason that the question is immaterial, the question of defective machinery not being raised by the allegations of the pleadings.

9.

In permitting the witness Gardner to answer over the objection of the defendant the following question, to wit, "Now, what repairs?" (referring to the repairs upon the engine) for the reason that the question is immaterial, no question as to the condition of the engine or whether in or out of repair being in the case by the allegations in the pleadings.

10.

In permitting the witness Gardner to answer over the objection of the defendant the following question, to wit, "Now, how much was this engine disabled by the springing of the eccentric blade?" for the reason that no question of the disability of the engine was raised by the allegations of the pleadings.

46 XI.

In permitting the witness, Dr. Mills, to answer over the objection of the defendant the following questions, to wit, "How many patient- were there in the same building with the plaintiff?" for the reason that the answer to the same might have and did have a etendency to inflame the minds of the jury against the defendant.

XII.

The court erred in giving the following instructions, "The first question in this case is was the accident which caused the injury of the plaintiff the result of negligence on the part of the defendant, its agents or servants, and on this question I charge you that it is your duty to find that said accident was the result of such negligence," for the reason that it was and is the providence of the jury to find whether such accident was the result of negligence, that being the very question which the jury itself was called upon to try, and the court had not the right to determine the question as a matter of law, and, further, for the reason that the evidence in the case was not sufficient to justify the court in so instructing the jury.

XIII.

The court erred in instructing the jury as follows, "The mere happening of the collision between the two trains of the defendant unexplained, under the circumstances while the undisputed facts of the case show, raises a presumption of negligence which, in the absence of evidence t-nding to show that the defendant's servants in charge of said trains were without fault, would be sufficient for you to base a finding of negligence on," for the reason that said instruction assumes that the happening of the collision was unexplained, when in fact the evidence shows explanation of the same,
leaving said defendant without fault, and therefore no such
47 presumption of law as the court mentioned could arise in
the case.

XIV.

The court erred in giving the following instruction, "But not only has the defendant failed to offer any testimony whatever tending to show that *is*t servants were without fault, but the uncontradicted testimony shows affir*am*tively that they were grossly at fault," for the reason that it was not the province of the court, but that of the jury, to determine from the evidence whether or not there was any fault on the part of the defendant, and, further, for the reason that although the servants of said defendant may have been at fault the negligen- acts of said servants would not bind or make liable the defendant for the inju*r*es resulting therefrom.

XV.

The court erred in giving the following instruction, "The train with which Hulett's train collided and which had orders to flag against Hulett's train had no business to be where it was at the time of the collision. It should have remained at the point where the flagman was put off and sent forward until he had proceeded a sufficient distance forward to guard against accidents, but instead of that the train followed behind the flagman only a few hundred feet and was thereby placed in a position where it was impossible to prevent a collision with the train which came dashing around the curve with its load of human freight, ignorant of the impending danger," for the reason that it was not the province of the court, but that of the jury, to say whether the train with which Hulett's train collided was placed in a position where it was impossible to prevent a collision with the train coming around the curve, and for the further reason that the language of the court is of too impressive and emphatic a nature to be used in an instruction to a jury,
48 having a tendency to unnecessarily inflame their minds against the defendant.

XVI.

The court erred in giving the following instruction to the jury, "This was gross negligence on the part of those in charge of said train, and, the facts being undisputed, it is the duty of the court to tell you so and not to confuse you with abstract definitions of negligence which you may not understand alike, and *am*y therefore have difficulty in applying," for the reason that it was not the province of the court, but that of the jury, to determine what was and what was not and whether there was negligence on the part of the defendant, and for the further reason that ne*h*ligence on the part of those in charge of the train would not bind or make liable the defendant for any injury resulting therefrom, and, further, that the word gross, as characterizing the degree of negligence, is an improper expression to be used in an instructi*o*n to a jury, tending to the giving by the jury in the particular case of damages much in excess of the amount justified by the proof of injuries.

XVII.

The court erred in instructing the jury that negligence in the management of either of the trains is sufficient for the purposes of the case.

XVIII.

The court erred in instructing the jury that the negligence in this case was the negligence of the conductor and engineer of the train which was at fault, for the reason that it was not the province of the court, but that of the jury, to determine that any particular act was negligence or that any particular person was negligent.

XIX.

The court erred in giving the following instructions to the jury, to wit, "While said conductor and engineer were in a sense
49 fellow-servants with the plaintiff in the employ of the defendant, they were in another sense agents of the corporation, clothed with the control and management of a distinct department of the business of said defendant, and are therefore to be treated as the personal repre-entatives of the defendant, for whose negligence it is responsible to subordinate servants," for the reason tha- said instruction does not correctly state the law or rule of decision in force in this Territory on said subject.

XX.

The court erred in instructing the jury that the defense of the defendant that the plaintiff was injured through and by the negligence of his fellow-servants fails in this case," for the reason that under the law and rule of decision on the subject in force in this Territory the defense so set up by defendant was fully maintained by the evidence, and the jury should have been so instructed.

XXI.

The court erred in giving the jury the following instruction, to wit, "But if the caboose was attached to the train for the accommodation of the trainmen alone, the flat car being provided for the gang of track workmen, or if the servants of the company in charge of the train directed the workmen to take positions on the flat car, then they were not guilty of negligence in obeying that direction and riding on said car, and of course the plaintiff, being one of said workmen, was not guilty of contributory negligence in that particular," for the reason that any direction of the servants of the company in charge of the train in the particular mentioned would not release the person obeying such directions from the effect of his own negligence in doing the act, unless it was shown by the evidence that the employee in charge of the train was authorized by the defendant to give such direction.

50 XXII.

The court erred in instructing the jury that the defendant must establish the fact of contributory negligence by a preponderance of

the evidence, for the reason that the same is not a correct statement of the law on the subject, the defendant only being required to make out a *prima facie* case of contributory negligence, in which event it becomes incumbent on the plaintiff to show the exercise of due care in the particular matter in question.

XXIII.

The court erred in refusing to give to the jury instruction number 2 asked by the defendant, which is as follows, "That the presence of indications of injury appearing in September or October upon the body of the plaintiff, if any such existed, is no evidence that such injury was inflicted or received in the month of April before," for the reason that it was necessary to call to the attention of the jury the fact that it might have been possible, taking into consideration all the evidence, that the injuries testified to as existing at the time of the trial might have been received by reason of other causes than the accident in question.

XXIV.

The court erred in refusing to give to the jury instruction number 3 asked by the defendant and which is as follows, "Tha- the plaintiff was at the time of the collision a fellow-servant and coemployee of the engineers and conductors of the colliding trains, who were engaged in a common employment with him, and that if they find from the evidence that said collision occurred through the negligence of said conductors and engineers, or the negligence of the conductor or engineer of either of said trains, or the negligence of either the said conductor or engineer of either of said trains,
51 and that the plaintiff was injured thereby, that in that case defendant would not be liable to plaintiff for said injury," for the reason that the statement of law therein contained is the law and rule of decision in force in this Territory.

XXV.

The court erred in not instructing the jury, as asked by the defendant, to the effect that the plaintiff cannot recover for any negligence other than that alleged in the complaint, for the reason that plaintiff is required to enumerate in his complaint every class of negligence upon which he relies as a basis of his action, and cannot rely upon any other than that which is stated in his complaint.

XXVI.

The court erred in not instructing the jury, as asked by defendant, to the effect that the allegations in plaintiff's complaint are not sufficient to cover any negligence of defendant except negligence in the operation of its trains, for the reason that no other class of negligence is alleged in the complaint except negligence in the operation of trains.

XXVII.

That the court erred in not instructing the jury, as asked by the defendant, to the effect that there can be no recovery unless negligence of the defendant in the operation of its trains is proven by a preponderance of the evidence, for the reason that the mere fact that a collision occurred is not sufficient to raise the presumption that injury resulting thereby was by reason of the negligence of the defendant.

XXVIII.

That the court erred in refusing to set aside the verdict and grant a new trial in the particulars set forth in the
52 motion therefor.

XXIX.

The court erred in entering judgment for the plaintiff and against the defendant.

The clerk of said court is instructed hereby to transmit to the supreme court of Washington Territory a transcript of all pleadings, motion for a new trial, bill of exceptions, notice of appeal, bond on appeal, judgment, and all record entries made in said cause and all other papers required by law to be transmitted.

JOHN H. MITCHELL, JR., AND
N. T. CATON,
Attorneys for Defendant, Northern Pacific Railroad Company.

Endorsement: No. 616. In the district court of the 4th judicial district, Washington Territory, holding terms at North Yakima, for Yakima county. David O'Brien, plaintiff, *vs.* N. P. R. R. Co., defendant. Notice of appeal upon proceedings by way of writ of error. Filed in my office this 17th day of April, 1888. D. A. Clement, clerk.

53 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in the County of Yakima, W. T.

DAVID O'BRIEN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Reavis, Mires & Graves, attorneys for plaintiff.
J. H. Mitchell, Jr., and N. T. Caton, attorneys for defendant.

Bill of Exceptions.

This cause coming on for trial in the district court, holding terms at North Yakima, in Yakima county, W. T., the following proceedings occurred and constituted said trial; that after impannelling the jury the following testimony was introduced upon the trial and

the following objections and rulings made thereon and thereto, and exceptions were then and there to each of said rulings duly made and by the court allowed.

54 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima.

DAVID O'BRIEN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } No. —.

Messrs. Reavis, Mires & Graves, attorneys for plaintiff; J. H. Mitchell, Jr., and N. T. Caton, for defendant.

Case tried at the regular October term of the above court, A. D. 1887, before Hon. George Turner and a jury, commencing October 17, 1887.

Plaintiff's Testimony.

J. A. QUINN, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

(By REAVIS:)

Q. Where were you, Mr. Quinn, about the 21st of April last?
A. Well, sir, I was on the Northern Pacific railroad, stationed at Easton, running between Easton and Martin.
Q. You may describe the train on which you were braking—the engine.
A. No. 468.
Q. 468?
A. Yes, sir.
Q. Who was the conductor and who was the engineer?
55 A. The conductor's name was Rhodes, the engineer's name was Mooney.
Q. This train, you say, was running between Cle-Elum and Easton, ordinarily?
A. No, sir; she was running, when I was working on her, between Easton and Martin.
Q. That is on further up the road from Easton—that is, Martin is?
A. Yes, sir.
Q. Martin is which station, the station near the tunnel?
A. Yes, sir.
Q. Now, on this particular day where did the train go?
A. Well, sir, we got orders to run to Cle-Elum.
Q. To run to Cle-Elum?
A. Yes, sir.
Q. Do you know what those orders were?
A. Well, Mr. Rhodes told me that he had a flagging.

(MITCHELL:) We object to what Rhodes told him.

(REAVIS:) May it please the court, the orders under which the train, testified to by the witness, ran are the same that we moved the court to require the defendant to furnish us. We desire now to have the order introduced in evidence.

(MITCHELL:) We have here what the court knows to be the original order, and which we produced here for inspection some days ago. This order is made in triplicate, and one is just as much an original as another.

The COURT: I suppose counsel make this demand to satisfy the requirements of the law, and they have offered a copy which they have.

Mr. REAVIS: This is all we desire, that this go in as the original order.

MITCHELL: We have no objection to that.

REAVIS: I desire to pass the paper to the witness.

MITCHELL: I do not understand that he testifies that he knows what the orders were at all.

(Paper read by Reavis to jury as follows:)

"97. EASTON, *April* 21.

Rhodes & eng'r eng. 468:

Run from Easton to Cle-Elum wild; flag against Hulett; work train between Cle-Elum and Nelson's siding, and Elwin work train between Cle-Elum and Easton.

56 12 C. F. R.
97, O. K. 12, 10 p. m.
E. F. R.
A. D. M.

Rhodes.
13 Mooney.

Q. About what time did your train—I mean about what time of day did your train and engine No. 468 start to Cle-Elum?

A. Well, sir, I should judge about 12.15 to 20, between 12.20 and 12.30; it was after 12 o'clock some minutes; I don't know exactly what time it was.

Q. You started from where?

A. Easton to Cle-Elum.

Q. State about the distance between Easton and Cle-Elum.

A. I think it is 12 miles.

Q. 12 miles?

A. Yes.

Q. Now, who was the fireman on that engine?

A. His name, I think, was Gardner.

Q. You may state how you came on down to Cle-Elum.

A. Well, sir, we came right along until we got to Nelson's siding, when Mr. Rhodes told me——

Q. (Interrupting.) How far is Nelson's siding from Easton?

A. I could not exactly say the distance, although I worked a good while there. I don't pay much attention to distance.

Q. Go on, then.

A. When we got there Rhodes told me he had a flag——

(MITCHELL:) We object to what Rhodes told him.

REAVIS: You need not tell what any one said; tell what was done there.

57 A. I got over on the engine to tell the engineer to run carefully; that we had to do flagging. I rode on the engine till we got to Cle-Elum bridge, just going over the trestle-work in a big fill between the trestle and *and* the bridge and the point where we had the collision. I told him that he should stop as soon as he got over the bridge——

(MITCHELL:) We object.

The COURT: Objection overruled.

A. I told the engineer where I wanted him to stop when we got over this bridge. I wanted to go around the curve to flag. He stopped, and I got off. I started out on a little run and kept right on going until I got around this point of the curve, and I saw this train coming.

Q. The Hulett train?

—. Yes, sir. I gave the signal to stop, and they passed me; and I turned around, and after that I could see their caboose. I could see they had a collision, but the collision was a good ways this side of where I got off to flag.

Q. Was this side of where you got off, you say the collision was?

A. Yes, sir.

Q. Could you state about where you got off to flag the Hulett train?

A. I could say that it was right at this bridge. I don't know the number of the bridge or how far it is; it is a pile bridge; considerable there between the Cle-Elum bridge and this curve where the wreck was.

Q. How far would you think it was from the curve where the wreck was?

A. To this bridge?

Q. Yes.

A. Between ten and eleven telegraph poles; might be 12 to where they struck.

58 Q. Now you may state, if you know, what is meant by flagging—by an order to flag a train.

A. Well, sir; it is——

(MITCHELL:) State whether you know.

A. I believe I know. I am supposed to be a certain distance ahead of the train.

Q. Then, if you know, you may state what that order is.

A. It is supposed to be about a distance between 15 telegraph——

Q. (Interrupting.) About how far would that be in miles or parts of a mile?

A. It is pretty near three-quarters of a mile, I should judge.

Q. That is the order to flag?

A. That is the way I understand it.

Q. How far were you ahead of your train and engine when you got to the curve where the collision took place?

A. How far?

Q. Yes, sir.

A. It was ten or twelve telegraph poles. I could not say exactly; but from the point of the curve to where I got off——

Q. What was the distance between you and your engine when you got there, then?

A. I don't know. I did not look back. I did not pay any attention. I got off, and my business was to be around the curve as quick as I could.

Q. Had you any means of telling about the collision—how near your engine was to you?

A. From where they struck to where I was was a distance of about between three and four telegraph poles. I was about four telegraph poles to where they struck; whether they were there or not when I gave the signal, I don't know.

59 Q. How far was your engine behind you at that time?

A. At the time I signalled the train?

Q. Yes, sir.

A. I don't know. I did not look back until I was around the curve.

Q. What kind of a curve is that? You may describe it.

A. It is a pretty short curve. I heard some one say it was a ten-degree curve. I don't know.

(MITCHELL:) We object to the witness making so many statements what other people said.

Q. Describe the curve just as you understand it—as you know it.

A. I don't know that I could give a proper description of the curve. I know it curves around the bluff; there is considerable curve before you come to the buff; after you get two-thirds of the way around the bluff you come on straight track, going west.

Q. Stands in this form, does it? (Here counsel indicated position of track by position of his arms:)

A. Yes, sir.

Q. Now, your train came along here?

A. Yes.

Q. This is for illustration, and the other train this way (indicating)?

A. Yes, sir.

Q. That is, it stands this way: This is the Yakima river (changing position of his arms).

A. You were right the first time.

Q. Well, how long are the sides of these curves—about how long?

A. How long is the curve?

Q. Yes, sir.

A. I should think it was between a quarter and a half-mile curve.

Q. Which side of the bluff is the curve on?

A. On the inside.

Q. Now, how far can a train be seen from the track as a
60 train would be running—how far from your engine could the other train be seen?

A. You mean from where they had the collision?

Q. How far the other train could see it; yes.

A. They could not see but a little ways, because the bluff would stop them from seeing very far. I should judge, maybe three or four hundred feet.

Q. Where were you when the collision occurred, as near as you can state?

A. I was between the third and fourth telegraph poles from where they struck this way?

Q. Down this way?

A. They struck west of where I was.

Q. You mean east?

A. I mean west.

Q. You were east of the wreck?

A. Yes, sir.

Q. What kind of an engine was your engine, Mr. Quinn?

A. She was what they term a hog engine, a consolidated engine.

Q. You may state whether it was one of the larger engines up there or not.

A. Yes; there is larger engines up there, but she is the second largest size, I believe.

Q. Now, you may state, if you know, where she was going.

A. Well, I believe the intentions were to go to Ellensburg to get repaired.

Q. You may state, if you know, whether she was going to be repaired.

(MITCHELL:) We object.

REAVIS: I will withdraw that and put another question.

Q. You may state if there was any defect about the engine.

61 (MITCHELL:) I object on two grounds: first, they have not based their allegations of negligence upon defect in the machinery; second, the question is undoubtedly leading; but I do not put it upon that ground merely, but upon the ground that, having made their case upon one series of allegations in the pleadings, they cannot prove any other; that if there was anything the matter with the machinery of the engine, that that must have been relied upon. If there was anything objectionable in the operation of the road and the operation of that train and the running of it they must rely upon it, and that is what they have relied upon in this case. If your honor please, there are many authorities upon that point, and the general doctrine is to that effect. (Citing authorities, and after further argument and answer by Reavis the following ruling was made):

THE COURT: I will overrule this objection at this time.

MITCHELL: We note an exception.

THE COURT: Exception allowed.

Q. You may state if there was any defect about the engine.
A. Well, sir, there was supposed to be; the engineer said there was.

(MITCHELL:) We object, if your honor please. Move to strike that out.
The COURT: It is struck out. Tell only what you know. You are not to tell what anybody else told you. It is not evidence at all. When you are asked a question it calls for your own knowledge. If you don't know you can say so.

Q. What did you see about it in the management of it?
A. Well, I seen she was not working like she generally done.
Q. What was the difference between her working then and the way she generally worked?

(MITCHELL:) We object.
The COURT: Objection overruled.
MITCHELL: We except.

A. Well, sir, she would not pull as many cars; she would not start going ahead or backing up as fast as she used to, but she would go both ways, but not so fast; she would start, but
62 not quite so fast. I expect she would run as fast after she would get started.
Q. Either way?
A. Yes; either way.
Q. Well, how long would it take to start her one way or the other?

(MITCHELL): We object.
The COURT: Objection overruled.
MITCHELL: We except.
The COURT: I don't know that this has any pertinancy. I make the ruling because I do not see what it is coming to. If it don't come to anything, you are not injured.

A. It is according to which way she was standing when they tried to start her. If she was standing on the defective centre, whichever centre was defective, it would make her go slower, from what I understand of engines.
Q. What do you mean by that?
A. I mean that there was one side of her hurt in such a manner that she would not take steam. I believe she would not hold steam in the cylinder. It would blow right through when she took steam in the steam-chest It would blow out in the exhaust pipe. That would leave her lame on that point—what we term lame, but the other points I guess was all right.
Q. Then what would have to be done to start her?
A. Start her by throwing the lever ahead and take steam in that end of the cylinder and let her go back a little bit; throw her the other way, and then go.
Q. How much time would that take?
A. Oh, about a second.

Q. About what time of the day was it that the collision took place?

A. I had no watch. It was pretty near one o'clock—about 12.40 or 12.50; somewhere along there.

Q. You saw the work-train pass you when you flagged against it?

A. Yes, sir.

63 Q. How far were you from it when you gave the danger signal?

A. Well, I was a little over three telegraph poles from it.

Q. That would be about what distance?

A. Well, I don't know exactly how far the telegraph poles are apart. They are generally 28 to 30 to the mile; sometimes 25. I was not quite to the fourth one when I could see them.

Q. How long was this curve?

A. Something over a quarter of a mile; between a quarter and a half.

Q. At what point did the collision actually take place?

A. It did not take place on the curve at all. It took place on the straight track, just after you got around the curve.

Q. How far from the point of the curve?

A. It is a short ways; maybe 100 or 150 feet.

Q. From the point?

A. Yes.

Q. Now, what rate of speed was this train going when it passed you?

A. I could not say. I could not say how fast she was going, not in justice to myself, not under oath, to tell the truth and be sure of it.

Q. You could not state about how fast she was going?

A. No; I could not. I was on the outside of the curve. The train looks to be going very fast when you are on the outside of a curve.

Q. This train appeared to be going very fast?

A. Going pretty fast.

Q. How long had you been running on this train, this engine, before the collision?

A. Well, I could not say. I think about some time in April, along in April, I was sent to Easton to go with Rhodes breaking. I do not know exactly. Either the last of March or the first of April I went there to work.

64 Q. Now, you may state what your experience in railroading has been.

A. My experience has been considerable. I have done a good deal of railroading.

Q. How many years have you been engaged?

A. I started in 1871, but I have not followed it steady all the time.

Q. Well, how steadily?

A. Oh, sometimes I would be off three or four months; such as running threshing machines, or be out of a job a few months.

Q. State what places you have held under the Northern Pacific, defendant.

A. Well, sir, I have held the position of brakeman. I run a little while extra this spring since the wreck.

Q. As what?

A. Conductor.

Q. Where?

A. Between Cle-Elum and Martin, on that piece of track.

Q. Look at this diagram, Mr. Quinn. (Paper handed witness.) Look at that and state whether it is approximately correct.

A. I don't think it is quite correct, because you have placed the collision on the curve.

Q. Now, you may state whether that approximately shows the appearance of the curve there.

MITCHELL: We object to the use of the word approximately. Let him ask the witness how it compares with that.

The COURT: Objection overruled.

A. As far as I can say, the drawing is pretty near like the curve.

Q. Now, mark on this, if you please, about where you got off of the big engine.

A. We will call this the Cle-Elum bridge here——

65 The COURT: It is not admitted in evidence

Q. I would ask you, then, what this would represent, the diagram?

A. That will represent the Cle-Elum bridge there.

Q. Where did you get off?

A. After you get over the Cle-Elum bridge there is a trestle-work on this straight track. Just as you get across that trestle-work, on the east end, I got off and started to go around this curve.

Q. Now, then, does this line here represent with approximate correctness the line of the track on which these engines were running?

A. Yes, sir.

Q. Does it represent the curve in the same manner?

A. Well, pretty near; yes.

MITCHELL: We will interpose an objection, because the figures and words were marked on there before submitting to the witness. I think it is hardly proper.

The COURT: Let Mr. Reavis make his own case, and if it is not sufficient I will not let it in.

Q. Now, how does the height of the bank represented there compare with the height of the bank as it exists there at the curve?

A. 15 feet? Yes, I think it is about the height of it. Maybe higher; it is sloping to the river.

Q. Now, is that diagram approximately correct in all its particulars as you see it?

A. I don't know it is correct, but a person might explain something by it.

Q. Well, is it nearly correct, the general outline?

A. Oh, the outline is pretty near correct.

REAVIS: We will offer it in evidence.

The COURT: Let me see it. (Paper handed to court.)

MITCHELL: We will object, if your honor please.

The COURT: I think it is too crude and the approximation too uncertain to be of benefit.

REAVIS: Then we will withdraw it.

Q. I will ask you now to make a diagram of what exists there or did at that time.

66 A. I am not very much of a draughtsman. I don't know whether I can do any better than that or not.

The COURT: Is there any diagram that can give the jury any better idea of the distance between these trains and the distance from the curve at which this flagman got than an expression in feet and yards from the witness himself? Of course, any diagram made by an uninformed person would not be admissible because it would be misleading. If it is the curve you want to get in, that ought to made by some one who can speak with greater certainty than an uninformed one.

REAVIS: This is the best we can offer as to the condition.

The COURT: As to the distance, I can see no necessity for a diagram at all; as to the extent of the curve, the diagram might be useful if the court could see that it was reasonably certain as representing the curve actually existing there. Of course, if you are unable to show that, it is no reason why the court should let in one that was not true.

Q. When the collision occurred how far were you from the wreck?

A. The wreck?

Q. Yes, sir.

A. I was pretty near a distance of between four telegraph poles. I was not quite to the fourth one.

Q. East of the wreck?

A. Yes, sir.

Q. Where did you go then?

A. I came right to the wreck as soon as I could come.

Q. What did you see there?

A. I seen considerable of a wreck.

Q. Just describe it.

A. Well, the first thing I seen was a man on the right-hand side lying up against the bank. I seen some lying down on the

67 river side. I went forward and seen some pieces of men lying there. I started then to go to Cle-Elum to get assistance. When I got around the curve I seen Hulett coming from Cle-Elum as fast as he could. I went then back to help pick up the men.

Q. Do you know the plaintiff, Mr. O'Brien?

A. Well, I could not say I recognized him then among those that were hurt, because every one was under excitement and was not paying attention. We were trying to get them all in as good positions as possible.

Q. Now, I would like to have you state as particularly as you can just the condition of that wreck, the situation of these two engines and the flat car. Just describe it as near as you can.

Mr. MITCHELL: We object to that as immaterial in this case.

The COURT: I think I will overrule the objection. It might be part of the *res gestæ*, and ought to come in.

MITCHELL: We will save an exception.

Q. Go on and describe the wreck.

A. When I got there the engine *there the engine* that I came down on, they had got a little ways apart from where they struck and the flat car was sticking in the hind end of her tank. Some of the trucks were in front of the other engine, the engine going up, and some pieces of men were lying there.

Q. The engine that was going up?

A. Yes.

Q. What became of the flat car?

A. It was drove quite a distance into the other engine tank.

Q. Into the big hog engine?

A. The body of the car.

Q. What is the tank, the tender?

A. The tender,

Q. Was she backing down?

A. Yes.

68 Q. Now, what was the condition of the boilers of the big engine?

A. The boiler was all right; nothing hurt but just the tank knocked in, the flat car sticking into her.

Q. How far did the flat car run into the tank?

A. I could not say how far it did run in, but it was in so far that it would ride in there without falling down.

Q. It would ride right in there?

A. It was drove in there so that the tank would carry it all right. I suppose it might be half ways of the tank; I did not measure it.

Q. Now, you said something about some men being killed on the front there. Where was that?

A. On the front end of the other engine.

Q. Of the Hulett engine?

A. Yes, sir.

Q. Who was that?

A. Mr. MITCHELL: I object; it is immaterial.

REAVIS: I will withdraw that.

Q. Now you may go on and describe the situation and condition of the Hulett engine.

—. It was all right, only what we call the smoke arch or forward end was knocked in and the pilot broke down.

Q. Now, then, state what position the Hulett engine was in with reference to the car on which the workmen were riding.

A. The forward end; it was ahead of her.

Q. The Hulett train came up from Cle-Elum with the flat car ahead of the engine?

A. Yes, sir.

Q. What was the distance from the track to the Yakima river, where this collision occurred?

A. I could not say exactly; it is on a slope. The river was pretty high at the time and pretty close to the foot of the embankment.

Q. Describe the ground on both side of the track where
69 the collision occurred.

A. One side is a bluff and the other side is a river, fill, and riprap.

Q. Riprap with what?

A. It is rock put there to keep the water from wasting the bank away. I don't know that it was riprapped on purpose. It might have been taken out of this side cut they made to get around there. It was pretty rocky.

Q. The other side you say was a bluff?

A. Yes, sir.

Q. Abrupt bluff?

A. Yes, sir.

Q. How close to the track?

A. I could not say that. I guess it was four feet or maybe five feet from the rail to the bottom, and then sloping a little back—not much, pretty near straight up and down.

Q. Now you may state, Mr. Quinn, where you were when you saw the Hulett engine first, as near as you can.

A. I was on the outside of the ties, on the outside of the curve, when I first saw it.

Q. Now, did you stop running at all?

A. No, sir; I did not stop running. They passed me—that is, I stopped as soon as I seen them, and gave them the signal as soon as I did. I stopped then, for I knew that there was no use running further. I had to get out of the way a little bit.

Q. Did you hear them whistle brakes there?

A. No, sir.

Q. Now, from the time you got off of your engine to flag, state what you position was in going down.

A. Well, I was stepping on the third tie—I was missing
70 one tie all the time, in a kind of a trot. I was not running my best, but I was going along pretty lively.

Q. Going alone pretty fast?

A. Yes, sir.

REAVIS: I believe that is all.

Cross-examination.

(By MITCHELL:)

Q. How often had you been around there *been around there* before that time?

A. Well, I had been around there a good many times before; I could not say how many.

Q. Well, about how many?

A. I could not say; I have been around there a good many times before.

Q. Now, are there not three bridges before you come to that

curve from the direction you were coming—a bridge and two trestles?

A. Yes; the Cle-Elum bridge and two trestles.

Q. Now, you say you got off ten telegraph poles west of the curve—between ten and fifteen?

A. Between 10 and 12, from where they struck to where I got off.

Q. I mean from the point of the curve, how far was it that you got off?

A. I could not say exactly, but it was quite a few; it — one more than where they struck at the end of the bridge.

Q. You don't claim to know anything about engines?

A. Well, no; not about locomotives. I don't know much about them.

Q. All your work has been braking?

A. Well, I fired a little, but not much. Rode a good deal on engines when braking.

71 Q. It is only what you have seen when you have been *when you have been* around trains?

A. That is all.

Q. Not as engineer?

A. Not on a locomotive. I have run stationary engines.

Q. You have not been employed regularly; you take a job now and then?

A. Yes; but I have worked sometimes pretty steady for awhile and then I would be off awhile, strike something better, or think I could get something better and get fooled sometimes.

Q. You have nothing to do with the orders given the conductor and engineer?

A. No, sir; only do what the conductor tells me.

Q. You do not see the orders ordinarily?

A. Not all the time. Sometimes they will show them to me.

Q. You did not see the orders that day?

A. No, sir; he just told me.

Q. You did not see the orders on which they were running?

A. No, sir; only what Rhodes told me.

Q. I don't care what he told you. You did not see any orders from the dispatcher at all?

A. No, sir.

Q. You did not know on what orders they were running?

A. I could not swear to it, only what I was told; that is all.

Q. Where was it you went forward to the engine—where was the train when you first went forward to the engine?

A. At Nelson.

Q. How far was that from the curve?

A. Oh, it must be three miles—about three miles, I guess.

Q. By whose orders did you go on the engine?

72 A. By Mr. Rhodes, the conductor.

Q. How far were you from the point of the curve when you got these orders?

A. About three miles.

Q. What distance do you say telegraph poles are apart?

A. Some roads there are 25 to the mile, some 28, and some 30.

Q. What distance are they apart on this road up there?

A. I could no- say, but I think about 28.

Q. How long had you been running between Easton and Martin?

A. Well, I was up there. I must have went up there about the last of March or the first of April—along about the first of April.

Q. You had been running on that route since?

A. Yes.

Q. Between Cle-Elum and Martin?

A. Made a few trips between Cle-Elum and Martin since. I think I made three after that.

Q. They have mile-boards on these telegraph poles?

A. Yes, sir.

Q. Now, you say you can't tell how far they were apart?

A. No, sir; I could not, unless I knew how many there were between the mile-posts.

Q. You say that when you were standing at the side of the track you were in a position where the work-train would appear to be running faster than it did?

A. It would be that way, I should think.

Q. You don't pretend to know or be able to tell how fast trains run?

A. I pretend to know pretty near if I am riding on the train. I can guess pretty close how fast she runs then.

Q. Is it not a pretty hard matter, even for a railroad man, to tell how fast trains run?

73 A. Yes; it is a pretty hard matter to tell exactly. You can tell whether they run very fast or very slow, but the miles are hard to tell.

Q. But where you were it appeared to be going faster than otherwise?

A. It appeared to any one on the outside of the curve that the train was running pretty lively where I was.

Q. You did not see your train after you left it until after you came back from around the curve?

A. No, sir; I did not.

Q. You did not see it until after the collision occurred?

A. Until after collision had occurred, no, sir, I did not see it, because when they passed me their caboose—even if I had been close enough to see—I started to run after the caboose after she passed me. I could not see it for that.

Q. Could you have seen the end of the tender of your engine—of the engine of your train—in looking around the curve at the point where you were standing at the time the other train passed you?

A. I don't think so.

Q. You say the work-train was between three or four telegraph poles away from you when you signalled them?

A. Yes, sir.

—. You mean when you signalled them or first saw them?

A. When I gave the signal, just before that, they were coming around a little log house. I knew there was no use to give a signal when they could not see me.

Q. Then you did see them before you gave the signal?

A. Just a second; kind of flashed by the house. There is a tree growing there and some stuff. The side of the train was to me, I know.

74 Q. How far were you to the eastward of the end of the curve at the time you saw them?

A. How far was I?

Q. Yes, sir.

A. The curve is a considerable ways from where I was.

Q. The end of the curve which you had passed in going to where you gave the signal?

A. From the west end of the curve?

Q. The west point of the curve.

A. Oh, I was about three to four hundred feet—three hundred feet; might not be that much.

Q. What time did you say you left Easton?

A. Something after 12 o'clock.

Q. Do you mean to say you flagged by telegraph poles?

A. Well, I don't know exactly the right distance, but we only had a light train. If we had had a heavy train or something of that kind, if we had come down with a heavy train expecting to meet another train, we would have gone further, but as we came along light we did not think it required to be so far; I did not think so.

Q. You did not think so?

A. No, sir; I got off at what we considered a proper distance for any train to stop.

Q. You would consider it a proper distance for any train to stop?

A. A train of that kind; yes.

Q. The fact of the matter is you had an engine, tender, and caboose?

A. That was all we had—engine, tender, and caboose; a box car we used for a caboose.

Q. Now, at the time of the collision neither your engine, tender, or caboose, or the flat car or engine or caboose of the other train left the track?

75 A. No, sir; there was nothing left the track, not that I saw.

Q. Everything stayed right on the track?

A. Yes, sir; everything stayed on the track, except the trucks of the flat car; the body of the flat car stayed in the water tank; the trucks were off the track, I think.

Q. From the place where you gave the first signal to the point of collision was how far?

A. Well, the distance between—a little over three telegraph poles.

MITCHELL: That is all.

(End of testimony of Quinn.)

W. H. BOWMAN, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

(By REAVIS:)

Q. Where were you about the 21st of last April, *last* Mr. Bowman?

A. I was in Cle-Elum, working for the railroad company.

Q. What were you doing—what were you engaged in?

A. Surfacing track—construction work.

Q. Under what foreman?

A. Abercombi.

Q. Do you know the plaintiff, Mr. O'Brien?

A. Yes, sir.

Q. What was he doing then?

A. He was working on the same kind of work along with me.

Q. Now, how long had you been engaged in surfacing along that road above Cle-Elum?

A. I had been working for the company off and on for a
76 couple of months, perhaps; I don't remember the exact time.

Q. What I want to know is how long had this surfacing been going on above Cle-Elum?

A. Well, as far as I can remember, it began about that month.

Q. How far was this foreman, Abercombi's party, taken out from Cle-Elum to their work?

A. About six miles.

Q. How did he take them?

A. Took them on the train—Hulett's train, generally.

Q. State if he would take them out in the morning after breakfast.

A. Yes; take them out in the morning, bring them back to dinner, and take them back after dinner, and bring them in in the evening.

Q. You may state what time they came to dinner usually—what time of day.

A. We had dinner about 12 o'clock; sometimes all the way from eight to ten, or fifteen minutes after.

Q. Then you left to go to your work?

A. No; we left to go to work about 12.45.

Q. The train would leave Cle-Elum?

A. Generally.

Q. Generally at 12.45?

A. Varied sometimes.

Q. How much would it vary?

A. Varied as much as ten minutes sometimes during the time.

Q. Your work, you say, was about six miles away at that time?

A. As well as I can remember; yes, sir.

Q. Had this train, this work-train, been running regularly for some weeks?

A. Yes, sir.

Q. Now, you may state on the 21st of April about what time you left Cle-Elum after dinner—after your noon meal?

77 A. Well, I did not notice that day exactly what time we did start; it was about 12.45, I should judge.

Q. You may state who was on the train.

A. It would be impossible for me to call the names of all.

Q. I mean the officers under whose charge.

A. Hulett was conductor and Swain was engineer; the brakeman, I did not know his name.

Q. Who was fireman?

A. I did not know the fireman's name.

Q. Now, the plaintiff was on that train?

A. Yes, sir.

Q. Under the direction of the foreman, Abercrombi?

A. Yes, sir.

Q. Was he on the train?

A. Yes, sir; he was in the caboose; I suppose he was.

Q. Where were you on the train?

A. I was riding on the platform of the caboose.

Q. Now, state how that train ran; were you at the collision?

A. Yes; I was aboard the train at the time.

Q. State how that train ran from Cle-Elum to the place where the collision occurred.

A. I should judge that it was running about 35 miles an hour.

Q. MITCHELL: We object; that is not responsive.

The COURT: I do not know what he intended; I suppose it was running on wheels.

REAVIS: I do not desire to lead him.

Q. You had been riding on the train for quite awhile, had you?

A. Yes, sir.

Q. Now, what speed was she running when she went around that curve?

A. Well, judging from the way we ran around there before, 35 miles an hour.

MITCHELL: We object.

78 The COURT: Objection overruled and exception allowed.

Q. You may state whether you have been on trains often and have had much experience.

MITCHELL: We object.

The COURT: Objection overruled and exception allowed.

A. I have had some experience; I have worked on trains, and on this train.

Q. Have you ever timed them when running?

A. Yes, sir; that is what I judge from. We would run that six miles in from eight to eleven minutes, and it seemed that we were running as fast at that time, if not faster; fully as fast, if not faster.

Q. The flat car was ahead, was she?

A. Yes; ahead of the engine.

Q. Was the plaintiff on the flat car?

A. Yes, sir.

Q. State about where the collision occurred.

MITCHELL: We object.

A. I should judge two and a half miles above Cle-Elum.
Q. What kind of a place was it that this collision occurred?
A. It was on a curve—close to a curve? It was on a curve where we struck.
Q. On a curve?
A. Yes, sir.
Q. What kind of a curve. Describe it as well as you can.
A. I suppose it to be about a ten-degree curve.
Q. How long was this circle this way, till you got around it?
A. Only a quarter of a mile.
Q. You had been around there frequently, had you?
A. Yes, sir.
Q. You may state what you saw at that collision.
A. When I straightened up—I fell in getting off—I slipped
79 off to my left, and I saw a number of dead men, some that were dead and crippled.

MITCHELL: We move to strike that out.
The COURT: Objection overruled. Exception allowed.

Q. Go on.
A. I went down, and the first one I went to was entirely dead, and the next one was O'Brien. I called to another fellow to help carry him up into the caboose, and we did so. I went on the other side, and we carried in all that was crippled.
Q. What was the plaintiff's condition when you found him?
A. Well, his head was badly cut and he was unconscious. He was that way when we carried him into the caboose. How long he stayed that way I do not know.
Q. State how far he was lying from the track.
A. About 20 feet.
Q. What kind of ground was that 20 feet from the track?
A. All rocks.
Q. Was it toward the river?
A. Yes; toward the river from the track.
Q. State wh-t-er it was level ground or inclined?
A. Inclined.
Q. About what kind of an incline?
A. About half pitch, I suppose.
Q. Just explain what you mean by half pit-he?
A. Just one to one.
Q. What else did you see with reference to the condition of the two engines and the flat car after the collision and at the time?
A. The flat car was drove quite a ways into the tender.
Q. In the upper engine?
A. In the tender.
Q. Into the tank?
80 A. Yes; into the tank.
Q. What became of the water in the tank?

A. It ran out, I suppose.

Q. Were there any indications of what became of it there on the wreck?

A. The flat car was wet pretty much all over. I suppose a good deal ran out on the flat car.

Q. What was the plaintiff's condition when you picked him up?

A. He was perfectly wet when I first picked him up. I thought that he had been in the river. After I saw the condition of the flat car I supposed he was wet from the water from the tank.

Q. That was the tank of the engine that collided with yours?

A. Yes, sir.

Q. What was the condition of the engine that you were on?

A. Well, the pilot was all smashed off of it and stove in; there were two men mashed in there, or part of two men.

Q. Were they killed?

A. Certainly they were killed.

Q. Well, you may state where you were at that particular time of the collision?

A. I was riding on the front end of the caboose—of Hulett's caboose.

Q. Where was the caboose with reference to the engine?

A. The caboose was right back of the tender.

Q. And the engine ahead?

A. Yes; ahead of the caboose.

Q. You may state if you saw the big engine that collided with you?

A. Not until after we struck, when I stepped off.

Q. State just as nearly as you can at what point on this curve the wreck was the collision occurred.

A. It was close to the other end of the curve, so close that
81 both trains ran back after they were struck onto the straight track.

Q. Now, on that curve, how far ahead could an engine be seen from your train?

A. Not more than three hundred feet, if that.

Q. Describe the ground on each side of the track where the collision occurred.

A. On one side, on the right-hand side as you came up, there is a high cliff of rock, and on the other side there is a riprap of rock.

Q. When you found the plaintiff, where was he lying?

A. Lying down near the water's edge.

Q. Well, on what kind of ground?

A. No ground at all; it was a pile of rocks.

Q. What kind of rock?

A. Granite that was blasted out of that cut.

Q. Was the rock taken from the cut and thrown below and used in the riprap?

A. Yes, sir.

Q. When did you next see the plaintiff after you took him up, as you stated?

A. After I had taken him in the caboose I carried in all the rest that were unable to get in, and then went back to him again. By the time I got back to him the second time it was three-quarters of an hour, or maybe longer; he was able to speak.

Q. You may state about the number of persons there were on that flat car.

A. Twenty to twenty-three; somewhere near that.

Q. What were they doing—that is, what were they engaged in?

A. Engaged in surfacing the track.

Q. Under what foreman?

A. James Abercrombi.

82 Q. Now, you may state, at the wreck, what you saw there, with reference to the injured on the wreck.

Mr. CATON: It seems to me we are not particularly anxious to know how many were injured. We are enquiring about the injury of this plaintiff.

(After further argument the court sustained the objection.)

Q. You may state after you returned to the plaintiff how long you remained with him.

A. Eight or ten days, at Cle-Elum, I stopped with him.

Q. How was he taken to Cle-Elum?

A. He was taken down to Cle-Elum on the caboose and carried from there to the hotel.

Q. What hotel?

A. Reed's hotel.

Q. Who is the proprietor of that hotel?

A. Mr. Reed.

Q. You may state what his condition was when he was taken to the Reed hotel.

—. He seemed to be disabled in his shoulder and his breast, side, and spine.

Q. You may state what the indications were, with reference to his suffering pain.

MITCHELL: We shall object. This witness is not an expert.

The COURT: The question is how did he appear as to suffering pain.

MITCHELL: That is a matter of opinion.

The COURT: Anybody knows when another is in pain.

MITCHELL: We except.

A. He was in great pain.

Q. For how long a time?

A. As long as I stayed with him. I was there eight or ten days.

Q. You may state what his condition was just as you saw him and knew him.

A. MITCHELL: We object.

83 The COURT: Overruled. Exception allowed.

A. He seemed to be crippled in his shoulder and in his breast and side. I supposed that his ribs were broken and the physicians told me——

MITCHELL: We move to strike out the answer; it is entirely irrelevant.

The COURT: I will strike out what the physicians told him about the ribs.

Q. Now, what was the appearance of his head?

A. His head was cut in three or four places, where it had to be sewed up.

Q. What was the appearance of his shoulder?

A. His shoulder appeared to be broke, from the way he suffered and the way we had to handle him.

Q. Did he have attendants with him during the time to take care of him?

A. Yes; Mr. Smith and myself took care of him.

Q. Well, you may state if you dressed his wounds under the direction of a physician.

A. No, sir.

Q. Did you see them dressed by any one?

A. Only his head.

REAVIS: That is all.

Cross-examination.

(By MITCHELL:)

Q. Where do you reside now?

A. At Roslyn.

Q. How long did you say you had been in the employ of the company previous to this accident?

A. I think about two months; somewhere near that time.

Q. You do not, as a fact, know what time you left Cle-Elum that day?

A. No, sir.

Q. How does it come that you were riding on the front
84 platform of the caboose?

A. I had a right to ride there; supposed I did. I had permission from the conductor to ride there.

Q. That was a large caboose?

A. Common size, I suppose.

Q. There were quite a number in the caboose, were there not?

A. None of the laborers in the caboose.

Q. You could not see the flat car in front of the engine from where you sat?

A. Not without I leaned around; step down on the step and look ahead.

Q. You did not do that?

A. I did.

Q. When?

A. While we were going out to work.
Q. What occasion did you have to do that?
A. I wanted to see what was ahead.
Q. At what point did you do that?
A. Two or three different points.
Q. How far down on the steps did you get?
A. On the bottom step.
Q. You swear that on that *on that* step you could see around that engine and see that flat car?
A. I could see the one side of the flat car—see the men sitting on it.
Q. What kind of an engine was this that you had?
A. I don't know anything about engines.
Q. The fact is you have not railroaded much, anyway?
A. Not a great deal.
Q. That two months is about all you ever did railroad-, is it not?
A. That is about all.
85 Q. Most of the time you were engaged in surfacing?
A. Yes, and levelling and raising the track.
Q. Do you mean to say you can tell how fast a train is running?
A. Yes, when I know the distance they are running and the times it takes, that gives a pretty good idea.
Q. You did not time them that day?
A. No, sir.
Q. You don't know the time they left Cle-Elum?
A. No, sir.
Q. You don't know the time they arrived at the wreck?
A. No, sir, not exactly; I know within a few minutes.
Q. Then you cannot say how fast they were running?
A. I did not say for certain how fast they were running.
Q. You gave an estimate?
A. Yes, sir.
Q. What was that?
A. 35 miles an hour, judging from the way they ran before when I was timing them.
Q. You said in your examination-in-chief about thirty miles an hour, did you not?
A. No, sir.
Q. Are you sure of that?
A. I am sure of it. I estimated it 35 miles.
Q. Are you as sure of the fact that you testified in your direct examination that it was running about 30 miles an hour as you are of every other fact you testified to?
A. No; I do not think I ever said it was going 30 miles an hour. I never estimated it that low.
Q. Where have you timed trains?
86 A. Right there, when I was working for Abercrombi.
Q. How do you know O'Brien was on the flat car?
A. I saw him there, saw him go on.
Q. Did you see him while he was on after the train left?
A. I don't know that I saw him after the train left.

Q. Now, would not that train appear *appear* to be going much faster, you being down on that step, than if you were in the car?

A. No, I don't know that it would, because I have rode outside and inside of a caboose.

Q. You say there was a rocky bluff on the left-hand side of the curve where it was ballasted up?

A. Yes, sir.

Q. You said that was granite?

A. I don't know what kind of rock.

Q. You said it was granite?

A. I said I supposed it was granite.

Q. Do you know of any granite being in that country?

A. I don't know anything about it; I know it was stone of some kind.

Q. You don't know anything about granite; you don't know wh-ther it was granite or not?

A. I know it was rock.

Q. Now, you said you stopped at Reed's hotel immediately after the accident for nine days?

A. I did not say what number of days—from eight to ten.

Q. You were watching on Mr. O'Brien at that time?

A. Yes, sir.

Q. Can you swear as a fact that you waited on or attended upon O'Brien after the 24th, four days after the accident?

A. I don't remember what day I did leave there, but I stopped in the town after I quit waiting on them and saw them every day.

87 Q. What was the occasion of your stopping the attention upon these wounded persons?

A. I was getting paid for it by the railroad company, and after they let me out they concluded one nurse was sufficient.

Q. How soon after the accident occurred did you stop work?

A. I don't just remember how many days.

Q. You said it was eight or ten days.

A. Somewhere along there; might not have been so many or might have been more.

Q. W-re you waiting on Arthur Hyde after the 24th day?

A. I don't remember anything about the date; it was at night when I was waiting on them.

Q. You have taken considerable interest in this case, have not you?

A. No great sight of interest.

Q. I will call your attention, Mr. Bowman, to the 24th day of April last, in a room upstairs in the Reed hotel, where Arthur Hyde was, and you were watching on him, and ask you if you did not state to him there, at that time and in that place, substantially and in effect the following language: You don't want to get well too soon, and you want to sue the company for some four or five thousand dollars damages. That you further said that it was better not to get well too soon, because if you went into a court with a good leg the court and jury would not give him as much damages as

claimed; and when Arthur Hyde replied to that question by saying, "What would that be for?" and you said so that you can recover all the damages you claim, and it is easy enough to have one leg a little shorter than the other?

REAVIS: We object.

The COURT: I will hear you, Mr. Mitchell.

MITCHELL: The purpose of this question is to show that this witness is an interested witness; that he has been urging suits to be brought by injured persons, even when they were willing
88 to settle and to go to work, where they had slight injuries. I wish to show his interest in the case.

The COURT: I do not see that this matter is contradictory of anything testified so far. I will sustain the objection.

MITCHELL: Suppose it lays the foundation to impeach him. It lays the foundation if he says he did not make the statement.

The COURT: You are trying to impeach him about something that he has not denied. I will sustain the objection.

MITCHELL: I desire to call the attention *to* the court to the testimony by him that he was watching on Mr. O'Brien, and also at the same time Mr. Hyde, and that his attentions were given to both during the same time.

The COURT: If he denies making the statement, you prove that he did make it. You have proved something which is not contradictory of anything that he has heretofore denied. It is only contradictory of what he now denies, and that is with reference to something that is entirely immaterial. You can't ask a witness if the moon is made of green cheese and then contradict him.

MITCHELL: I want to show that immediately after he made that statement that he was dismissed. I want to follow it up by my own testimony that I overheard it.

The COURT: I sustain the objection. I do not say that this may not be competent under certain aspects of the case, but you have no testimony which makes it competent yet.

MITCHELL: We will note an exception.

The COURT: Exception allowed.

Q. You have considerable interest in seeing Mr. O'Brien recover in this case?

A. I would like to see him.

Q. You had considerable interest in the matter of his claim at the time of your waiting on him and since and during all that time?

A. Well, I have. I would like to see him recover damages. I believe he is entitled to it; that he is crippled for life.

MITCHELL: I submit I am entitled to ask the question. I submit the same question as before.

The COURT: The court rules the same and exception allowed.

Q. Have you been providing any money for the maintenance of this prosecution of this case?

A. No, sir.

Q. Will you swear that you were in attendance upon this plaintiff after the 25th day of April?

A. I won't swear to it at all.

Q. Will you swear that you were in attendance upon him more than five days altogether?

89 A. I won't swear as to the number of days.

Q. Did you not swear on your direc- examination you were watching him between eight and ten days?

A. I said eight or ten days; near that; I did not swear to the number exactly.

Q. You are not positive?

A. No, sir.

Q. You don't pretend to know anything about Mr. O'Brien's wounds?

A. I have a pretty good idea.

Q. Except as Mr. O'Brien would indicate?

A. Yes.

Q. That was all?

A. Yes.

Q. You don't know how the shoulder looks when broken, do you?

A. If I saw it before it was set I would know whether it was in proper shape or not.

Q. You could not tell whether his spine was injured, could you?

A. Only from his appearances.

Q. You don't pretend to know anything of these matters?

A. Only from the man's appearance when I took care of him.

Q. You don't pretend to know anything about railroading or running the trains?

A. No, sir.

Q. In fact you don't claim to know much about this, anyway?

A. I do claim to know considerable about it.

Q. Where is the spine located in the body of a person?

A. You will have to ask some physician.

Q. Do you know?

REAVIS: We object. The witness is not produced here as an expert at all by the plaintiff. As I understand the rule, he cannot be examined as an expert.

The COURT: The witness testified something about an injury to the spine, and the other side have the right to ask what he

90 knows about the spine.

Q. Do you know where the spine is in the body?

A. I suppose it is along in here. (Witness indicated lower portion of spine.)

Q. Down in the lower part?

A. Yes, he complained of all of his back.

Q. Now, do you know how a healthy spine would look or an injured spine would look?

A. No, sir.

Q. Then you don't know anything about that spine business?

A. No, sir.

claimed; and when Arthur Hyde replied to that question by saying, "What would that be for?" and you said so that you can recover all the damages you claim, and it is easy enough to have one leg a little shorter than the other?

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The COURT: I do not see that this matter is contradictory of anything testified so far. I will sustain the objection.

MITCHELL: Suppose it lays the foundation to impeach him. It lays the foundation if he says he did not make the statement.

The COURT: You are trying to impeach him about something that he has not denied. I will sustain the objection.

MITCHELL: I desire to call the attention *to* the court to the testimony by him that he was watching on Mr. O'Brien, and also at the same time Mr. Hyde, and that his attentions were given to both during the same time.

The COURT: If he denies making the statement, you prove that he did make it. You have proved something which is not contradictory of anything that he has heretofore denied. It is only contradictory of what he now denies, and that is with reference to something that is entirely immaterial. You can't ask a witness if the moon is made of green cheese and then contradict him.

MITCHELL: I want to show that immediately after he made that statement that he was dismissed. I want to follow it up by my own testimony that I overheard it.

The COURT: I sustain the objection. I do not say that this may not be competent under certain aspects of the case, but you have no testimony which makes it competent yet.

MITCHELL: We will note an exception.

The COURT: Exception allowed.

Q. You have considerable interest in seeing Mr. O'Brien recover in this case?

A. I would like to see him.

Q. You had considerable interest in the matter of his claim at the time of your waiting on him and since and during all that time?

A. Well, I have. I would like to see him recover damages. I believe he is entitled to it; that he is crippled for life.

MITCHELL: I submit I am entitled to ask the question. I submit the same question as before.

The COURT: The court rules the same and exception allowed.

Q. Have you been providing any money for the maintenance of this prosecution of this case?

A. No, sir.

Q. Will you swear that you were in attendance upon this plaintiff after the 25th day of April?

A. I won't swear to it at all.

Q. Will you swear that you were in attendance upon him more than five days altogether?

89 A. I won't swear as to the number of days.

Q. Did you not swear on your direc- examination you were watching him between eight and ten days?

A. I said eight or ten days; near that; I did not swear to the number exactly.

Q. You are not positive?

A. No, sir.

Q. You don't pretend to know anything about Mr. O'Brien's wounds?

A. I have a pretty good idea.

Q. Except as Mr. O'Brien would indicate?

A. Yes.

Q. That was all?

A. Yes.

Q. You don't know how the shoulder looks when broken, do you?

A. If I saw it before it was set I would know whether it was in proper shape or not.

Q. You could not tell whether his spine was injured, could you?

A. Only from his appearances.

Q. You don't pretend to know anything of these matters?

A. Only from the man's appearance when I took care of him.

Q. You don't pretend to know anything about railroading or running the trains?

A. No, sir.

Q. In fact you don't claim to know much about this, anyway?

A. I do claim to know considerable about it.

Q. Where is the spine located in the body of a person?

A. You will have to ask some physician.

Q. Do you know?

REAVIS: We object. The witness is not produced here as an expert at all by the plaintiff. As I understand the rule, he cannot be examined as an expert.

THE COURT: The witness testified something about an injury to the spine, and the other side have the right to ask what he

90 knows about the spine.

Q. Do you know where the spine is in the body?

A. I suppose it is along in here. (Witness indicated lower portion of spine.)

Q. Down in the lower part?

A. Yes, he complained of all of his back.

Q. Now, do you know how a healthy spine would look or an injured spine would look?

A. No, sir.

Q. Then you don't know anything about that spine business?

A. No, sir.

Q. Do you know anything about curves?

A. I know a curve from a straight track.

Q. Well, the counsel on the other side was talking about a circle of a curve; can you tell me what that is. Well, can you tell me what the arc of a curve is?

A. No, sir.

Q. Then you don't know much about curves?

A. No, sir.

Q. Did you not say this flat car was run in front of the engine?

A. It was put there by the trainmen.

Q. For what purpose?

A. To shove it out to where they worked.

Q. Shove it on a side track so they could get the engine out?

A. They generally run it in front of the engine.

Q. That was for the purpose of running it into the gravel beds?

A. We never run in gravel beds.

Q. On the side tracks next gravel beds; you understand what I mean?

A. It was put there for carrying the men out to work and for them to ride on.

Q. Suppose it had been put on the other end, could you have utilized it on the side tracks?

A. I am no trainman.

91 Q. How would they have done it?

A. Back it or run it forward.

Q. Did they not leave you the flat car for the purpose of loading it?

A. No, sir.

Q. Did they not leave flat cars on side tracks for the purpose of loading?

A. They did no leave that one.

Q. Well, you did not load gravel that day on account of this work?

A. We had not loaded any gravel.

Q. Were you not carrying gravel, using gravel in surfacing?

A. We were not. It was hauled to us; we used it after it was hauled and thrown off.

Q. Was not that flat car put on there for the purpose of reaching in on side tracks to pull out other cars loaded with gravel?

A. I never saw them used for that purpose. All I ever seen it used for was for carrying these men.

Q. You don't know but what it was used for that purpose?

A. No, sir.

Q. Then you don't know why it was on the front of the engine?

A. I don't know why they put it there in front or behind.

Redirect examination.

(REAVIS:)

Q. The flat car would have been put on behind and run up just as well?

A. Yes.

REAVIS: That is all.

Mrs. REED, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

(REAVIS:)

Q. Where was your residence, Mrs. Reed, about the 21st of last April?

A. Cle-Elum.

Q. What was your occupation there at that time?

92 A. We kept a hotel.

Q. What hotel did you keep?

A. The Reed house.

Q. Your husband's name is what?

A. Walter J. Reed.

Q. Do you know the plaintiff in this case, Mr. O'Brien?

A. Yes, sir.

Q. You may state where you first saw him, Mrs. Reed, if you can.

A. When I saw him first was, I think, the day after the accident.

Q. What accident do you refer to?

A. The day the accident occurred — this railroad there.

Q. The collision that occurred?

A. Yes, sir; the collision.

Q. Well, you may state how you came to see him there?

A. They brought him there hurt.

Q. Who brought him there, do you know?

A. Well I can hardly tell you which one did bring him; they brought several men there hurt.

Q. Do you know Mr. Bowman?

A. Yes, sir.

Q. Was he with them?

A. Yes, sir.

Q. Now, what was his apparent condition when he was brought there?

A. Well, his head was cut pretty bad in several places and he was hurt over his breast, and his sides seemed to be hurt; his collar-bone was broke right here (indicating); it was his right collar-bone.

Q. The right shoulder?

A. Yes: his shoulder seemed to be hurt. I could not tell anything about it. The collar-bone was broken.

93 Q. Now, how frequently did you see him and for how long a time after that?

A. I seen him every day for about four weeks; I think about four weeks; maybe a little more.

Q. During that time what was his apparent condition, with reference to pain?

A. Well, he complained of pain in his left side, down on his side, and his shoulder hurt him, and in fact you could hardly move him.

MITCHELL: We object and move to strike out all the answer as to the statements of the witness, what Mr. O'Brien complained of.

The COURT: Objection overruled and exception allowed.

Q. I would like to have you state generally what were the appearances of him during the time and how frequently you saw him, and if you saw his injuries dressed or dressed them.

A. Well, I saw his head dressed, but there was no cuts about him anywhere. I could see the bone where it was broken, the collar-bone. I could not see the bone, I could see the impression.

Q. Now, were you attending upon him?

A. Yes, I helped to attend to him considerable. I did not attend to him at all through the day. I would visit him four or five times through the day to see if he needed anything.

Q. You said something about moving him; state what that was.

A. He complained of suffering pain when I moved him. I put pillows about him to keep him from hurting. He complained of pain in moving; he would complain that it hurt him.

Q, Well, was he suffering pain?

A. Yes, he seemed to be suffering pain.

Q. Now, what were the indications that you saw of his injuries?

A. Well, I think he was pretty badly hurt, but I could not really tell anything about broken bones; only this broken bone here, the collar-bone.

94 Q. Did you see him spitting during that time?

A. Yes; he coughed and spit a good deal.

Q. What did he throw up when he spit?

A. Well, it seemed to be at first there was streaks of blood through what he spit.

Q. How long did you notice that?

A. Well, I could not tell just exactly the time; it was several days.

Q. How long was he there under your care?

A. I think about four weeks. I am not positive to the exact time, but I think about four weeks.

Q. Did his condition of pain continue during that time?

A. He got able to get up and walk around. He could not put his coat on while he was there. He was not able to put on his coat. He could not lift his arms to put on his coat.

Q. Do you know what physician attended his injuries?

A. Dr. Beebe and Dr. Newlin. Dr. Hill was there often; he was there every day.

Q. Do you know who called in Dr. Beebe and Dr. Newlin to see him?

A. I don't know.

Q. Do you know how they come to see him?

A. They dispatched down, I understood, for the doctors from Ellensburgh at the time of the accident.

Cross-examination.

(MITCHELL:)

Q. You say there were no cuts on him?
A. Only on his head, that I could see.
Q. How long was he there before he walked around all right?
A. I could not tell you exactly how long he was there before he walked around.
95 Q. Well, about how long?
A. I could not tell you. I should judge he was walking around about a week before he went away. He was able to get up and go around. I am not positive.
Q. Had you known him before, Mrs. Reed?
A. No, sir; I never saw him before. I suppose I saw him, but did not know him. I seen all the men, but, of course, did not know them.
Q. You say Dr. Beebe and Dr. Newlin attended him?
A. They were there.
Q. Do you know Dr. Mills?
A. Yes; there was a Doctor Mills there.
Q. He also attended him?
A. Yes, sir.
Q. Was not Dr. Beam there too?
A. There was another Dr. there, but I did not know him.
Q. And Dr. Morrison?
A. Yes; he was there. He was there at the time when they were dressing their wounds. He helped dress their wounds. I think he was there at the time the accident took place.
Q. Dr. Beebe attended him most of the time?
A. Yes; most of the time.
Q. Dr. Wheelock is the local physician there?
A. Yes.
Q. You knew nothing about his wounds only from his appearance?
A. That is all.
Q. You know nothing beyond that, beyond mere appearance, you say?
A. That is all.

96 Redirect examination.

(REAVIS:)

Q. What do you — by Dr. Wheelock being the lo-al physician?
A. Well, he lives in Cle-Elum.
Q. These other doctors don't live there?
A. They live in Ellensburgh, I think. I don't know Dr. Beam. I don't know where he lives.
Q. Do you know Dr. Mills?

A. Just when I see him.
Q. You don't know where he lives?
A. No, sir.

Recross-examination.

(MITCHELL:)

Q. Do you know who waited on Mr. O'Brien?
A. There was Mr. Smith and Mr. Bowman.
Q. Do you know how long Mr. Bowman waited on him?
A. Well, he was around there for, I think, pretty near about eight or ten days, but he was not waiting on him all the time. He would be out and in. He waited on them, I think, about four days. I am not just exactly sure how long he did wait on them. He sat up at night, I think; then Mr. Smith was with them all the time.

(End of Mrs. Reed's testimony.)

97 Dr. POWERS, a witness called on the part of the plaintiff, after being first sworn, testified as follows:

(REAVIS:)

Q. Where do you reside, Doctor?
A. In Ellensburg.
Q. How long have you resided in Ellensburg.
A. About four years.
Q. What is your profession?
A. Practicing medicine and surgery.
Q. How long have you been practicing medicine and surgery?
A. Since 1877.
Q. Do you know the plaintiff, David O'Brien?
A. I have seen the plaintiff.
Q. State if at any time you made any examination of Mr. O'Brien.
A. I did, some time in September last. I think about the middle of September.
Q. This recent September?
A. Yes, sir.
Q. You may state if there were any indications about his body of injuries.
A. There were; I found that his right claviele —, his right collarbone, and also found two cuts upon his head, and from the description he gave me of his feelings at the time——

MITCHELL: We object to the witness testifying about what Mr. O'Brien told him of his feelings at the time of the injury.
The COURT: He don't propose to tell what he told him.
MITCHELL: He is basing something on what he told him. We think it is not proper testimony here—representations made by this plaintiff at a time six or eight months subsequent to the accident. The question asked is for injuries which appeared on the body itself.

The COURT: I don't think the proposed answer is responsive. The first part, which has already been taken down, is.

Q. You may go on, Doctor, and state what injuries you discovered and noticed or indications of injuries.

A. Well, from the examination, we found the fracture of
98 the clavicle, a shortening which produced a deformity, and the two scalp wounds on the head, which were the result of a severe injury, with two slight elevations of the bone at the points of the cuts in the scalp, indicating that the bone had been injured at the time of the injury.

Q. That was the skull bones?

A. Yes, sir.

REAVIS: I would like to withdraw the witness a moment and call the plaintiff. I desire to put one question to him.

MITCHELL: We desire to have our objection noted to the withdrawal of the witness now.

The COURT: You can have an opportunity to cross-examine him; otherwise his testimony will be ruled out entirely. He is simply withdrawn from the stand to allow other witness to testify.

MITCHELL: We have no objection if we have the privilege to cross-examine.

DAVID O'BRIEN, plaintiff, being duly sworn, testified as follows in his own behalf:

(REAVIS:)

Q. You are the plaintiff here, are you, Mr. O'Brien?

A. Yes, sir.

Q. You may state where you were on the 21st of last April.

A. I was at Cle-Elum, in Kittitass county.

Q. What were you doing there?

A. I was working for the Northern Pacific Railroad Company, surfacing track.

Q. Where was the surfacing going on?

A. A little above—a little over five miles west of Cle-Elum at this time.

Q. How long had you been engaged in this work?

A. Some time in March; probably from about the 24th of March; somewhere along there.

99 Q. Who were you working under?

A. Mr. James Abercrombie.

Q. Was he foreman?

A. Yes, sir.

Q. You may state if there was quite a party of men working with you under Abercrombe?

A. Yes; there was quite a number.

Q. At the same work?

A. Yes; the same work.

Q. Now, you may state how you went to and returned from your work.

A. We returned with the work-train.

Q. Where did you return to?

A. To Cle-Elum, where we were boarding.

Q. Well, how often would you be taken to your work from Cle-Elum on this train?

A. Taken out in the morning, home at noon to dinner, and out to work after dinner, and home again in the evening.

Q. Now, how long had this been the usual way of going to work and returning from work?

A. Well, about three weeks or more; probably from the time we got far enough away that it would be inconvenient to walk to dinner.

Q. State whether or not you have been engaged in railroading much, Mr. O'Brien?

A. Well, I have, considerable.

Q. About how much?

A. Well, I could not say; I have worked at different times in different years; worked some in 1883-'4-'5 and 1887.

Q. Were you familiar with the road from Cle-Elum to where you worked along the track? Passed over it frequently?

100 A. Oh, yes, sir.

Q. Now, state if there was a collision on the road on the 21st of April.

A. Yes, sir.

Q. Where did that occur?

A. About two miles and a half west of Cle-Elum.

Q. What was the character of the road with reference to its being?

A. It was on a curve.

Q. What kind of a curve was it?

A. It is a pretty sharp curve. What some call an eight or ten degree curve. Some call it a ten-degree curve. I never measured it.

Q. State about what time your party took the train on the 21st—the work-train.

A. After dinner?

Q. Yes.

A. I saw one man look at his watch. It was ten minutes to one o'clock.

Q. Ten minutes to one when you left?

A. When we started with the train.

Q. State if that was about the usual time that the work-train left Cle-Elum.

MITCHELL: We object.

The COURT: Objection overruled. Exception allowed.

A. Well, it used to vary from five to ten minutes. Sometimes they were earlier than that.

Q. Now, you may state how far you went on that work-train that day.

A. I went until they had the collision.

Q. Where were you riding on the train?
A. I was riding on the flat car, in front of the engine.
Q. You may state if anybody else was riding on there.
A. There was about 22 others on the car when we started
101 from Cle-Elum.
Q. All this load on the work-train of workmen?
A. They were not all workmen; they did not all belong to the grade of workingmen.
Q. Did the greater portion of them?
A. Yes, sir.
Q. Now, you may state with what rate of speed the work-train was running as it approached this curve.

MITCHELL: I object. He has not shown himself competent. He has not been asked whether he knows.
REAVIS: I will ask that question.

Q. Now, I will ask you if you ever have timed trains running and estimated the speed.

MITCHELL: We object.
The COURT: The objection is overruled. Exception allowed.

A. I have, sir.
Q. Enough to have a judgment with reference to the rate of speed at which trains runs?
A. I think so.
Q. Now, what rate of speed was this train running as it approached the curve near the place of the collision?
A. As it approached the curve it was running, I should say, at the rate of 40 miles an hour.
Q. As it ran around the curve, what can you say?
A. About 35. They slacked up speed a little. The brakeman, he took hold of the brake on the flat car and slacked the speed a little.
Q. Did you hear any whistle there, Mr. O'Brien?
A. No, sir.
Q. Was there any whistle?
A. I think not; I never heard any whistle.
Q. State your position on this car. Where were you sitting?
A. I was sitting, on the south side of the car, next the river,
101½ and then within one or two of the back end of the car next to the engine, on the side of the car. I was back within one or two of the corner of the car. There was one or two between me and the corner.
Q. Who was sitting near you?
A. A man by the name of McLaughlin.
Q. Which side of you was he sitting on?
A. He was on the left of me.
Q. He was sitting, then, further over on the corner?
A. No, he was nearer to the engine.
Q. Then you were both near the engine?
A. Yes, sir.

Q. Now, when did you first observe the colliding engine that was coming east?

A. When we got on the sharpest point of the curve, right where the point of the mountain runs down to the track.

Q. Now state what you saw there at that time, the circumstances of the collision as near as you can?

A. The man that was riding to my right, in front, on the car, Mr. McLaughlin, he rose up and he said my——

MITCHELL: We object.

The COURT: Objection overruled. Exception allowed.

A. He says, My God, we are killed. I spoke and says, "What's the matter?" He says: "Do you see that engine?" pointing to it. He was right at my right-hand side, and I said, Jump quick, and he did; he got up and jumped off, and I jumped up on the flat car and I looked on the other side to see what show there was for a fellow there. I saw there was no show to get off on account of the rocks, that would have cut us to pieces; so I got over to the other side of the car and I started to jump, and the flat car was about to strike the engine, and I got whirled in the air and struck on
102 my head and shoulders down among the rocks, and that is all I knew of what happened until I found myself in the canoose. I don't know how long afterwards, but when I came to I was in the caboose, and they *to* took me back to Cle-Elum.

MITCHELL: I move to strike out any conversation with any one on the car had with him, or he had with any one on the flat car.

The COURT: You have your exception, Mr. Mitchell.

MITCHELL: I want to follow it up properly.

The COURT: The motion is overruled. The court wants to give you every exception you are entitled to, but don't see the necessity of taking up the time of the court.

MITCHELL: The court will remember that my objection was made really during the time that the witness was answering. It was not made to the question itself, but the facts developed in the answer of the witness which made it necessary for me to object.

The COURT: What you object to is this: Telling what the man said.

MITCHELL: I remember the court stating the other day that it was of no force unless followed up.

The COURT: Did you not take an exception to the ruling of the court?

MITCHELL: Yes, sir; I did.

Q. Now, when you found yourself in the caboose, who was around you?

A. Mr. Abercrombie and some parties that had come in from Cle-Elum.

Q. Anybody else?

A. Well, there was Mr. Phillips, he was beside me; Arthur Hyde, he was in front of me.

Q. Well, what position were you in?

A. Well, I was partly standing against the side of the caboose. I could not sit down. They tried to have me sit down, but I could not sit down.

Q. You speak of the time after the wreck?

A. Well, I was badly hurt when I came to.

Q. Who did you see of these men that were with you on the flat car?

A. I saw Mr. McLaughlin lying on the floor in the car, in front of me. He was the first one that attracted my attention when I opened my eyes.

Q. He was the man that was sitting by you, was he?

103 A. Yes, sir.

Q. Then what was done with you?

A. Well, I was taken to Cle-Elum and carried to the Reed house.

Q. Do you remember who carried you into the Reed house and who was with you?

A. I don't know who carried me to the Reed house.

Q. Now you may state what your injuries were.

A. Well, I had four cuts sewed up in my head; three in my head and one across here (indicating on his forehead). This collar-bone was broken in the shoulder and badly hurt. My breast was broke in here (indicating left breast), and some of my lower limbs on this side—right side—were broken and the spine of my back badly hurt. I had one middle tooth knocked out—broke out—and some small cuts I didn't pay much attention to. There was a piece of a rock buried in my hand here.

Q. How long were you there in the Reed house?

A. I was there from the 21st of April until the 30th day of May.

Q. What was your condition during the time and how did you feel?

A. Well, I felt in misery the greater part of the time—nearly all the time.

Q. Well, you may go on and state how in misery.

A. I had such intense pains I could hardly move. I could not move my hand a quarter of an inch if I should get a thousand dollars for it. I could not move from the way I was placed. I had to stay in whatever way I was placed till some one I called would come and move me. There was some loose bones in here that appeared to run right through me like a knife (indicating his chest) whenever they stirred me or tried to move me; so I had to lay just as I was. This broken arm hung out over the bed, and sometimes I would get some one to lift it up for me.

Q. Who attended on you there, Mr. O'Brien?

104 A. Dr. Beele and Dr. Newlin; they sewed up the wounds in my head.

Q. Who called them, do you know, to wait on you?

A. They told me the Northern Pacific Railroad Company had instructed them to wait on me.

Q. When did you leave the Reed house?

A. The 30th day of May, sir.

Q. What has been your condition since that time?

A. Well, I have been in pain ever since.

Q. Well, describe the character of it.

A. In my breast I have intense pain all the time, day or night, whether sitting or walking or lying down. There is a loose bone or something in here that pains me continually. My shoulder has growed together very imperfectly; it pains me if I let my arm hang down for any length of time, even walking along the sidewalk. These cuts in my head—my head is dizzy and affected from that fact. If I start to look up at anything, like that, for a few minutes I get so dizzy I can't see; the blood appears to rush back and forth in my head.

Q. You may state how you are affected when you exercise—that is, in a quick walking movement.

A. I can't move quick at all; my breast feels as though it was loose, as though it shook up and down, if I go to move quick on foot.

Q, How is it with your head?

—. Well, my head when I move that way don't affect me bad. When I lay down or get up in the morning I can't get up right away or I fall over. My head is dizzy when I get up in the morning or any time during the day if I lay down.

Q. Describe the character of these wounds that you say you suffer from internally as well as you can.

A. Something like a sharp point of something—a piece of
105 sharp bone in there that keeps pricking me all the time whenever I draw my breath.

Q. Does a full breath pain you?

A. Yes, sir.

Q. Now you may state how it is with reference to performing any work?

A. I can't perform any work of any kind.

Q. Have you done any since you were hurt?

A. Not an hour's work, unless chores.

Q. Now prior to this collision, Mr. O'Brien, what work did you do?

A. I was working upon the switch-back all winter; worked all last fall on the switch-back and all winter, and I came down out of the snow; I thought I would come down to Cle-Elum and go to work there out of the snow.

Q. You may state what you did, if you were able to do work generally, all the time before that?

A. Yes; I was able to do any kind of work.

Q. What had you been working at; what had your pay generally been for?

MITCHELL: We object to this question unless it is for the mere purpose of showing the amount of time lost by sickness. We claim that under the allegations of the complaint no permanent disability can be shown, and no loss of pecuniary profits other than the time during which he was laboring under this sickness. (Reading complaint, etc.)

The COURT: I think permanent injury is sufficiently alleged in this complaint.

MITCHELL: We except.

The COURT: Exception allowed.

Q. You may state now, Mr. O'Brien, what was your ability prior to this time to work, and what you received for it?

MITCHELL: We object.

The COURT: The court ruled upon your objection.

A. I have received different kinds of wages for different kinds of work. I have never received in this Territory less than a
106 dollar and a half a day and board anywhere outside the railroad company. I have received different amounts of wages. I have received two dollars a day and up. I have received $90 a month and $60 per month, according to the kind of work.

Q. You may state if you were able to perform work all the time.

MITCHELL: We object.

The COURT: Objection overruled.

MITCHELL: We except.

The COURT: Exception allowed.

A. Yes; always able to work; never been a day sick or hour since I came to the Territory, till I got hurt.

Q. How old are you, Mr. O'Brien?

A. I am now 49 years old—27th September last.

Q. When you left Cle-Elum where did you go?

A. I went to the hospital at Missoula.

Q. Montana?

A. Yes, sir.

Q. How long were you in the hospital there?

A. Well, I was 12 days there when I got my discharge.

Q. Then where did you go?

A. I came back to Ellensburg.

Q. You have been to Ellensburg since and vicinity?

A. I have been in Kittitass county, stopping with a friend.

Cross-examination.

(MITCHELL:)

Q. Who is the friend you have been stopping with?

A. Mr. Meads.

Q. How far is that from Ellensburg?

A. Ten miles.

Q. How long did you say you had been working in this surfacing before this accident?

106½ A. From the 24th of March, I think. If you wish dates I can give them to you correctly.

Q. That is as near as I care about it. You were working for the Northern Pacific Railroad Company?

A. Yes, sir.

Q. You were surfacing on their road?
A. Yes, sir.
Q. You were paid by them for the work you did?
A. Yes, sir.
Q. By that company?
A. Yes, sir.
Q. Was there room for you in the caboose?
A. Room?
Q. Was not there a caboose along with your train that day?
A. Yes, sir.
Q. Was not there room in the caboose?
A. I was not allowed in the caboose.
Q. Who prevented you going in the caboose?
A. Mr. Abercrombie and Mr. Hulett always told us to go on the flat car. I tried it frequently, but they always forbid us getting — the caboose.
Q. Did not some of the men get in the caboose?
A. I don't know.
Q. Was not some of the men riding that day in the caboose— some of the laborers?
A. There might have been.
Q. You say this train was running at the rate of forty miles an hour when you approached this curve?
A. Yes, sir.
Q. How do you know that?
106½ A. I have seen it timed and I have timed trains frequently. I have been riding on trains for thirty years.
Q. Do you pretend to say that you can tell within ten miles an hour how fast the train was running?
A. I think I can. I have had a great deal of experience.
Q. Can you tell within five miles per hour?
A. I think not.
Q. Then you don't know whether they ran thirty-five or forty?
A. I know it was running over 35 miles an hour.
Q. How do you know it was running over 35 miles an hour?
A. I know by the way it ran when I timed it and when I saw it timed.
Q. You don't know anything about the operation of railroads— that is, operating trains? You have never done any of that work?
A. Never.
Q. Never been connected with the operation of railroads in any way—that is, in operating trains?
A. Not about trains.
Q. You have never done any work upon a road except on grade?
A. Yes, sir. I had charge of railroad track for the Northern Pacific at Heron siding.
Q. That is in Montana?
A. Yes; western Montana.
Q. Is it not pretty difficult, Mr. O'Brien, for a man to tell on a train how fast she is going?

A. Well, it is.

Q. Very few railroad men can tell that?

A. Very few men can tell correctly. They can tell within a few miles, probably, and make themselves safe in saying.

Q. At what rate of speed was that train running when she rounded that curve?

107 A. Rounding the curve?

Q. Yes.

A. It slacked up some.

Q. How much did it slack up?

A. It slacked up five miles an hour.

Q. Where?

A. On the curve, as soon as the brakeman started it slacked up the speed a very little, enough to notice it.

Q. Do you mean to say that you can tell when a train slacks a difference of five miles an hour in running?

A. I said it slacked up as much as that.

Q. Do you mean to say that you can tell?

A. I can tell when a train is running when she slacks up speed a little, I can tell it.

Q. You don't know what time the accident occurred?

A. It was about 7 minutes to one o'clock by the time we had on the train.

Q. When the accident occurred?

A. Yes, sir.

Q. Seven minutes to one?

A. Yes, sir; I will say about seven minutes to one.

Q. Did you not testify that it was ten minutes to one when you left Cle-Elum?

A. Yes, sir; I say after we started on the train from Cle-Elum.

Q. How far from Cle-Elum?

A. Well, just got fairly started under headway.

Q. It was not your watch you looked at?

A. No, sir.

Q. Did you notice the time yourself?

A. I did. We very often noticed the time to see how long

108 it would take us to run out four or five miles or wherever we were at work.

Q. You were able to see everything about you when you were in the caboose?

A. No, sir; I was not; I could see everything in front of me, that was all.

Q. You named some of the men that you saw?

A. They were in front of me.

Q. You mean you did not turn?

A. I could not turn if I wanted to. I could not turn my head a particle.

Q. Now, when you were on that flat car, just before the accident, you said that you saw the tender of the engine before you struck?

A. The tender?

Q. The tender of the engine that collided with your train, you saw it before you struck?

A. Yes.

Q. And that after seeing it you had time to run to the side of the car next the bluff and then come back the other side?

A. I jumped upon the car on my feet. I was kind of leaning on my elbow on the car. I jumped to my feet and looked over on the other side to see what chances would be to get off *off* on that side.

Q. What did you do after you seen that?

A. I just moved around the other way, and as soon as these other men got out of the way I started to jump. Just about that time that car struck and threw me on my head on the rocks.

Q. Were not you working for Mr. Meade; you said *you said* you were stopping with him?

A. I was stopping with him.

Q. Were you not working for him up there?

A. No, sir.

109 Q. Were not you working there on a ditch for Mr. Meade?

A. No, sir.

Q. Will you swear that you have not done any work for Meade while stopping there?

A. I have done some chores, but I never have done a day's work nor a half day's work. I have turned water on his garden to irrigate it.

Q. Will you swear you were not working there on the 27th day of August last, on a ditch for Mr. Meade?

A. No, sir. I might have been tinkering at the ditch, and tried to get water to run down to irrigate his garden or to water his horses. We used to run the water down in the ditch close to his stables to water his stock and irrigate his garden. The ditch used to get broken at the head, and I would turn the water on.

Q. Your general condition of health just previous to this accident was not very good, was it?

A. It was very good, unusually good.

Q. I will ask you, Mr. O'Brien, if you have any agreement with your attorneys, Messrs. Reavis, Mires & Graves, or either of them, by the terms of which they are to receive a percentage of any recovery you may make in this case?

Mr. REAVIS: We object; it is immaterial.

(Further argument by counsel.)

The COURT: I will sustain the objection.

MITCHELL: We note an exception.

The COURT: Exception allowed.

Q. You walk around a good deal, don't you?

A. Yes; considerable.

Q. You say it pains you when you walk around?

A. It pains me less walking around than it does to sit there on the chair.

Q. Yet you say it pains you more to walk than to sit?

110 A. I said that if I sat still in a certain position it would hurt more than walking easy.

Q. Where have you been since your return from Missoula?

A. I have been in Kittitass valley.

Q. There is a court in Kittitass county?

A. Yes, sir.

Q. How did you come to commence suit in Yakima county?

REAVIS: We object; it is immaterial.

The COURT: Objection sustained.

Q. You are a resident of Kittitass county?

A. Well, no, sir; I could not say I was. I am as much a resident of Yakima as I am of Kittitass.

Q. How long were you in Kittitass county prior — this accident?

A. Since last October, I think.

Q. You have been in Kittitass county ever since your return from Missoula?

A. Yes, sir.

Q. You had been going over that route, going to and from your meals, how long before the accident?

A. Well, we had been going over every day—that is, for three weeks or more.

Dr. POWERS' testimony conctinued.

(REAVIS:)

Q. You heard the testimony of Mr. O'Brien here, did you, and what he said with reference to the injuries he sustained and the pain and the character of the pain he had suffered since that?

A. I did, yes.

Q. Now, in your judgment as a physician, what is his present condition, taking his statements to be true, coupled with the examination you gave him?

111 MITCHELL: We object. He should be confined to some particular condition.

The COURT: I think a hypothetical question can be put to the witness from what he has heard in the court-room, but am inclined to think that that statement ought to be reduced to writing or some proper form and submitted to the physician.

REAVIS: I will withdraw the doctor and proceed with some other witness till time to adjourn.

Mr. GARDNER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

(REAVIS:)

Q. Where is your residence, Mr. Gardner?

A. I reside along the road, mostly; sometimes in Kennewick; sometimes Martin.

Q. What is your occupation?

A. Locomotive fireman.

Q. For the defendant, Northern Pacific Railroad?
A. Yes.
Q. Where were you on the 21st of last April?
A. I was working between Easton and Martin, firing a locomotive.
Q. You were working, you stated, at Easton.
A. Yes; between Easton and Cle-Elum.
Q. What were you doing?
A. Firing a locomotive.
Q. What engine did you have?
A. 468.
Q. Who was the conductor of your engine at that time?
A. Rhodes.
Q. Who was the engineer?
A. Mooney.
Q. Prior to the 21st of April, where was that engine running?
112 A. Between Easton and Martin.
Q. What was it doing?
A. Hauling gravel for the switch-back.
Q. What kind of an engine was it? Describe it, with reference to size and weight.
A. It is a consolidated engine, about 65 to 70 tons.
Q. What was it denominated on the road, commonly?
A. They called it a hog engine.
Q. You say it weighed sixty or seventy tons?
A. Yes, sir,
Q. Is that larger than the other engines that run there?
A. No, sir; there is two larger than that.
Q. Is this larger than the ordinary engines?
A. Yes; it is larger; it is the second largest engine that the Northern has got.
Q. Now, the engine came down this side of Easton on the 21st of April, did she?
A. Yes, sir.
Q. About what time did you leave Easton?
A. I don't know; I did not look at the time, but I suppose somewhere about 12.20.
Q. How far is it from Easton to Cle-Elum by the railroad track?
A. It is about 13 miles.
Q. How far is it from Easton to the curve where the collision occurred—about how far?
A. A little over ten miles.
Q. Describe the track from Easton to the curve—the bridges, trestles, etc., as well as you can.
A. Well, it is mostly all straight track, with the exception of two curves on it.
113 Q. What kind of curves are they?
A. Well, I not accustomed to curves, I never examined to see, but I suppose there is a six-degree curve and one eight-degree.
Q. Where were you going with that engine on the 21st?
A. Intended to go to Ellensburg.
Q. What for?
A. Repair.

MITCHELL: We object. What they were going there for is immaterial.

The COURT: Objection overruled. Exception allowed.

Q. Now, what repairs?

MITCHELL: We object.

The COURT: Objection overruled and exception allowed.

A. I don't know that I could make you gentlemen understand if I should explain it to you.

Q. You can state what repairs in your own technical language; I think we will understand it.

A. If you gentlemen understand valve motion——

Q. You just go on and state it—state what repairs. I will ask you if I don't understand you.

A. Well, there was nothing broke about it; it was an eccentric blade that was sprung on one side.

Q. Which side?

A. On the right side.

Q. What effect did the springing of that eccentric blade have on the movements of the engine backward and forward?

MITCHELL: We object. It is immaterial and incompetent.

The COURT: I cannot tell — what it is material. I can see that he might show negligence by this class of proof.

MITCHELL: We save an exception.

The COURT: Exception allowed.

A. It affected the cut-off; it disabled the engine, the forward motion partly.

Q. What is the eccentric blade?

114 MITCHELL: We object.

The COURT: Objection overruled.

Q. You may state, so that the jury may have some information.

A. The eccentric blade is a rod which runs from the eccentric blade to the links.

Q. What office does it perform in the movements of the engine?

A. It does not exactly perform the movements of the engine; the eccentric moves that; that is moved by the eccentric. It has nothing directly to do with moving the engine.

Q. Now please state what is the office of the eccentric blade, if you can.

A. I am not—thoroughly posted engineer. I am not expected to explain all these things.

Q. No, but what you can explain.

A. I know what it is put there for and know the use of it and can use it.

Q. You can use it; now, then, state.

A. As I told you gentlemen, you don't understand the parts of that locomotive, and it is difficult for me to explain it to you without a diagram. If I had a locomotive in front of me I could make

you understand a little about it, but to go into details and explain valve motion to you, on that point it is almost impossible to do.

Q. Just state as near as you can.

A. I say, under the circumstances, it is impossible to do it.

Q. You said you knew how to use it; you knew what it was put there for. Now, what was it put there for? What does it connect with the other machinery of the engine?

A. It connects with the valve.

Q. And where is the motion imparted. What part of the engine gives the motion to the machinery it impels?

A. From what we call the valve motion.

115 Q. Now, how much was this engine disabled by the springing of the eccentric blade?

MITCHELL: We object.

The COURT: Objection overruled and exception allowed.

A. I could not tell you; I don't know how many horse power that engine is. She would not pull her usual load or we would not have been coming down.

Q. Do you know anything about the orders under which your train was running?

A. No; I don't know anything about that; I never read them; I did not have hold of them at all.

Q. You knew you were going to Ellensburg, did you?

A. I knew there was some intention of that.

Q. And what you were going for you knew, did you?

A. Yes, sir.

Q. You knew where you were when the collision occurred between your train and Conductor Hulett's work-train?

A. I was down on *terra firma*.

Q. How did you get off of your engine?

A. Got out of the gangway.

Q. Which side did you get off?

A. On the left-hand side.

Q. Was that the side towards the river?

A. Side towards the river.

Q. What was the effect on your engine by the collision—what effect did it have on yours?

A. It did not hurt the engine much, but it paralyzed the tender.

Q. How did it do that?

A. There was a flat car went into it about eight or ten feet.

Q. When did you first see the train of Conductor Hulett?

A. I don't know. We were on the first bridge from where

116 we struck when I first saw it.

Q. How far was that off?

A. About four telegraph poles.

Q. How was it with reference to the point of rocks at this curve—at the point of the curve that had been mentioned?

A. Well, there was a point in one place where the bluff was pretty straight, and you could see there.

Q. How far could you see around there?
A. If you were on the curve I don't suppose you could see more than three telegraph poles.
Q. How far were you from this point of the curve when the collision occurred?
A. About three car-lengths. We were on the straight track; we did not get on the curve.
Q. About three car-lengths from the curve when you struck the other engine?
A. When they struck us?
Q. When they struck you?
A. Yes.
Q. You couldn't see them until they rounded the curve, could you?
A. No, sir.

Cross-examination:

Q. Mr. Gardner, you don't claim to be an engineer?
A. No, sir.
Q. Don't claim to know anything about engines other than your duties as fireman?
A. That is all I am paid for.
Q. You have never acted as engineer?
A. Not on a locomotive.
117 Q. You don't know anything about the eccentric blade of this engine, except what some one told you?
A. That is all.
Q. You did not examine it yourself?
A. No, sir; not to make measurements or examine it particularly.
Q. Your business there was merely to fire on the engine?
A. Yes, sir.
Q. You had nothing to do with the orders of running the train?
A. No, sir; none whatever.
Q. No orders were ever given to you? You never received any orders?
A. No, sir.
Q. Now, your engine had stopped before the collision took place, and you were down off the engine?
A. It was stopped when I got off.
Q. Was that some little time before the other engine came around?
A. It was not very long.
Q. You had time to get down off the engine?
A. Yes; I had time to get off.
Q. What were you doing off the engine—anything in particular in connection with the engine?
A. I was looking out, and I saw them coming and I got off.
Q. You say you were on the straight track and were not on the curve?
A. No, sir; we had not struck the curve.

Q. You mean the point where the curve begins, on the west side of the point of the curve, or the point of rock around which the curve takes?

A. The curve commences somewhere close to that point of rock.

Q. Somewhat to the west of it?

A. Some little ways; not very far.

118 Q. As a matter of fact, Mr. Gardner, you don't know that that engine was disabled, of your own knowledge?

A. Well, I knew she was not right when we started with her. I knew that much.

Q. You did not know what was the matter?

A. Not at the first start, until we looked at her.

Q. You did not look to see?

A. I helped the engineer to look her over.

Q. You don't know anything about the eccentric blade—that is, enough to know what was the matter?

A. I did not give my attention to examine it thoroughly. I left him to do that.

Q. You did not look after that?

A. No, sir.

Redirect examination.

(REAVIS:)

Q. What kind of an engineer have you been?

A. I have been running stationary engine for two years.

Q. You say you jumped off?

A. I stepped off. I did not jump off.

Q. Did the other fellows get off that was on your train?

A. I guess they did. I was not looking after them.

Q. You did not notice whether or not they got off? You are still in the employ of the company, are you not, Mr. Gardner?

A. Yes, sir.

The COURT: Gentlemen of the jury, you will remember and observe the directions which I gave you at the noon recess—that is, not to converse with any one about this case.

Adjourn court until tomorrow morning at nine o'clock.

119 OCTOBER 17TH—9 o'clock a. m.

Continuation of the Testimony for Plaintiff.

DAVID O'BRIEN recalled.

(REAVIS:)

Q. In the use of your hands are you right-handed?

A. Yes, sir.

Cross-examination.

(MITCHELL:)

Q. Can you use your left hand just as well?

A. No, sir; not for any work.

Q. Which hand do you use in shovelling?
A. Right hand forward; and picking and chopping and sawing wood and everything of that kind.
Q. On which hand usually is the most use made in shovelling?
A. Well, I have seen about as many left-handed shovellers as right.
Q. Well, in case of a right-handed man, which hand is used the most in shovelling?
A. Well, the right hand is the best hand, the hand that is forward.
Q. Which hand raises the weight?
A. Well, the right hand is supposed to raise the greater portion of the weight.

(REAVIS:)

Q. How do you chop?
A. Right-handed.

Dr. POWERS recalled.

(REAVIS:)

Q. You stated, Doctor, when you were on the stand before, that you had examined the plaintiff. Now you may state what your examination detected with reference to injuries on the head and about the head.
A. Well, I found two cuts upon the head, two scalp wounds, with slight elevation of the bone, indicating that there had been
120 a slight fracture of the bone.
Q. Describe those cuts on the head as the examination showed them. Where were they?
A. One of them was on the left frontal bone and the other one on the right parietal bone.
Q. Did you notice any cut on the forehead?
A. Yes, sir; I did.
Q. What did you observe with reference to the right clavicle?
A. I found the right clavicle had been fractured, with a bad union, a vicious union, with shortening to the extent of about an inch.
Q. When was your examination first made, Doctor?
A. Some time in September.
Q. Now, taking your examination of the clavicle and its condition at that time of the injury, conditions resulting from an injury made on the 21st of April last, what would be your judgment, as a physician, as to the probability of the recovery from that injury?
A. Well, it would not be possible for it to be useful again. It impaired the usefulness of his arm permanently. It is a permanent injury.

MITCHELL: We object.
The COURT: It is too late; the question has been answered.

Q. You may state, Doctor, if you examined the chest of the plaintiff.
A. I did.

Q. What was the result of the examination? What condition did you find?

A. I found dullness on percussion on the left side, a flattened condition of the chest, and the resonence of the lung very much impaired, with an evidence of fracture of the ribs.

Q. What did the condition of the chest result from, in your judgment, at the time?

A. Well, my judgment would be that it must have been
121 caused by—well, taking, of course, the history of the case——

Q. Well, just on your examination?

A. Of course, it must have resulted from a heavy fall or blow.

Q. From the examination you have given the plaintiff, Doctor, can you form an opinion as to the permanency of the injuries?

MITCHELL: We object to that.

The COURT: On what ground?

MITCHELL: We claim that so far as permanency of injury is concerned that they must allege damages growing out of it specially. We expect the same ruling from the court, and note an exception.

The COURT: Objection overruled and exception allowed.

A. I would consider them permanent—that is, he never would be a useful man again.

MITCHELL: We move to strike out the answer as not responsive to the question.

The COURT: I will not strike it out; it is reasonably responsive.

Q. Doctor, can you state from your education and information and study of the standard tables used in estimating the expectancy of life the expectancy of a man in good health, 49 years of age, or can you?

MITCHELL: We object to that; it is not shown to be material; it is irrelevant and incompetent; it is not shown that this witness has ever had any experience with making tests of table- of that kind.

The COURT: He is asked if he can state what the expectancy is. I will overrule the objection.

MITCHELL: We will except.

A. I think I can state about the expectancy.

Q. Then, Doctor, you may state what would be the expectancy.

MITCHELL: We object; it is immaterial.

Q. Of the life of a man in good health, about 49 years of age?

A. It would be about 22 years.

Q. From the examination you gave the plaintiff and his statement that his head is affected and dizzy, blood appears to rush backward and forth in his head, preventing quick motion,
122 what were the probable injuries to his head?

MITCHELL: We object, because it has no similarity to the questions; it is not in keeping with any facts that have been detailed here in evidence. I understand that a hypothetical question must

be based at least on something that has been testified to, and there certainly has been no evidence here of rushing of blood in his head.

The COURT: I think I remember that very distinctly. I will overrule the objection.

(Question read.)

MITCHELL: What time do you refer to?

REAVIS: I put the fact as stated by the plaintiff, coupling the doctor's own knowledge of his examination of the witness.

MITCHELL: I object.

REAVIS: The statements were made here in court on the witness stand. I will put another question.

Q. From the examination you have given the plaintiff, if there was dizziness of the head and a feeling of the blood rushing backwards and forwards, and the patient unable to move quickly without feeling such effects in his head, what were the probable injuries to the head?

MITCHELL: We renew our objection.

The COURT: Objection overruled. Exception noted.

A. That question is a little difficult to answer I will state to the court that I did not hear him make any statement as to the blood rushing back and forth in his head. I might not think that it did.

The COURT: You are bound to assume that the blood did rush back and forth in his head, knowing that he had received an injury in his head, and, with these symptoms present, what would you consider the nature of the injury?

A. I should consider, knowing that the injury that he had received, the external evidences of it, that it was possible and probable that there was a fracture of the internal plates of the skull.

Q. What would cause the sensation, Doctor, like blood rushing backwards and forwards in the head, probably?

123 MITCHELL: We object.

Q. I ask what would probably cause the sensations of the blood rushing backwards and forward in the head?

GRAVES: The plaintiff, while on the stand, stated the blood appeared to rush backwards and forwards in the head, and the question is for the doctor to state what would be the injury that would cause that sensation.

The COURT: I see no objection to the doctor answering the question.

A. It might be caused, such sensations might be caused by a great many causes. The results of a blow upon the head sufficient to produce fracture of the skull would produce it often at a remote period of time; it would produce such sensations for the reason that where there is a fracture there would probably be a slight elevation corresponding to that fracture internally, which would press upon *upon* the brain and produce a kind of sensation or dizziness or pain.

It could also be produced by aenæmic condition, or where the patient had been subjected to a severe shock.

Q. If there was a prickling sensation in the left breast, continued for some months, where the person had sustained fracture of the ribs from a fall of some fifteen feet—a violent fall—what would that probably be caused from?

MITCHELL: We object to that; it is not in evidence.

The COURT: What is not in evidence?

MITCHELL: That he fell 15 feet.

The COURT: Objection overruled.

A. It would probably be caused from—as a result of the fracture of the rib, a spicule of bone was projecting internally, thereby irritating, thereby causing constant irritation.

Q. What, Doctor, would be the character of the pain suffered by a person who sustained injuries of the head such as you found on examination, a fracture of the ribs, a broken clavicle united such as the one you found?

MITCHELL: What is the object of the question, Mr. Reavis?

124 If the object is to show mental pain, we shall object.

REAVIS: Physical pain.

A. Locating the pains do not belong to my part. I would have to say that he might suffer pain from it, and every one of these injuries, or he might suffer pain in any one without reference to the others—that is, of course, at the time I examined them.

Q. You might mention each one, what would be the character of the pain?

A. In any case the pains would be severe—liable to be severe.

Q. Now, if a person is thrown violently from a railway train some 15 feet, lighting on rocks, and his head was cut and bruised, and his neck in such a condition that he could not move his head perceptibly, what would prevent the free motion of the head during that time, most likely?

A. I would believe that it would be the strain of the ligaments of the cervicle vertebræ in much the same manner as you would strain a joint.

Q. What would be the character of the pain suffered by such an injury as that?

A. In such a case the pain would be very severe.

Q. I believe that you stated that you had found indications of a fractured rib?

A. I did; yes, sir.

Q. What ribs were those?

A. The first and second.

Q. Just indicate, if you please, where these are to the jury?

(Witness did so.)

Cross-examination.

(CATON:)

Q. Where are you located now, Doctor?

A. Ellensburgh.

125 Q. I understood that you had been practicing some years.
A. Yes, sir.
Q. What number, Doctor?
A. Since 1877.
Q. Have you been engaged constantly in the practice?
A. I have; yes, sir.
Q. What school of medicine, Doctor, the old school?
A. Yes, sir.
Q. Commonly called the allopathic?
A. Yes, sir.
Q. There is no difference, I believe, among the schools of medicine in surgery — the same standard obtains?
A. I think not.
Q. Doctor Grace is considered a standard among all the schools?
A. Yes; he is authority among all of them.
Q. When called, Doctor, to examine a patient who was suffering injuries requiring surgical treatment, how do you ascertain the extent of his injury; what process would you pursue in order to form your diagnosis?
A. Let me understand the question.
Q. When you are called to examine a patient requiring surgical aid, what is your usual process in order to ascertain the extent of the injury?
A. First you would ascertain the history of the case; you would ascertain the amount of pain suffered at the time, and subject the patient to a physical examination.
Q. Then you have sight, manipulation, and information from your patient?
A. Exactly.
Q. Is it not frequently the case, Doctor, that your observation and your manipulation don't agree with the statement of the patient; does not that frequently occur?
A. Yes, sir.
126 Q. So that in the formation of a diagnosis, if your manipulation and your observation and the statements of the patient coincide, then you feel assured of your diagnosis?
A. Yes, sir.
Q. And when the statement of the patient does not agree with your manipulation and observation, you are liable to be wrong in your diagnosis?
A. No, sir; not necessarily; but you are sure of one thing, that the patient is either mistaken; it does not interfere with your diagnosis.
Q. Your diagnosis would be correct, based on this process?
A. On that examination.
Q. But suppose that you had relied very extensively in the formation of the diagnosis upon information obtained from the patient your diagnosis would be wrong?
A. In case you had to rely upon his statements and your physical examination, your diagnosis might be wrong.
Q. Doctor, in your experience has it not often proved to be the

case that the statement of the patient have not agreed with your observation and manipulation?

A. Very often.

Q. In the examination you gave this man you say it was in September?

A. Yes, sir.

Q. What examination did you subject him to?

A. I subjected him to a physical examination.

Q. In the formation of opinions in relation to his condition at that time you were very largely depending upon his statements as to the cause of the injury?

A. No; the evidence is there and is yet.

127 Q. But I say you were very largely depending upon his statements altogether for some facts?

A. No, sir; for the very reason that I expected this man would come before me with the intention of making his case as bad as possible; I expected that he would try to make his case as bad as possible, and when I came to examine him, though, I found that it was not necessary for him to deceive me.

Q. Then you were apprised of the fact that he was coming to you for this examination?

A. Yes, sir; I was.

Q. In anticipation, I suppose, of your testimony being used in this case?

A. I presume so.

Q. Doctor, you found him in the condition which you have related, of course?

A. Yes, sir.

Q. Could you from your examination you gave, could you determine the length of time that had elapsed from the time that these injuries had been received?

A. No, sir; that would be a question on which I could not give a decided answer.

Q. Is it not a fact, Doctor, that no medical expert could do that?

A. It is.

Q. Now let us get to the specifications, Doctor. You found the right clavicle dislocated?

A. Not dislocated, fractured.

Q. It had been fractured?

A. Yes, sir.

Q. You said to the jury that there had been a bad union?

A. Yes, sir.

128 Q. Doctor, is it not a fact that scarcely an instance is known to materia medici where the clavicle has been fractured that a perfect union takes place?

A. Well, it is true that a great many of these are imperfectly united, yet I have never had a case but what I have had a good result.

Q. A good result, but does it not leave its process apparent, Doctor, as an invariable rule?

A. Not always. There are many cases in which the facture

unites imperfectly, and failed to get a good union. It is so laid down in the works.

Q. You are not at all surprised, Doctor, as an expert, when you are told that there has been an imperfect union of the clavicle?

A. Not surprised.

Q. And it would make no difference what was the cause of that fracture, you might look for that result?

A. Well——

Q. I say, it would not make any difference what caused the fracture, you might look for the result?

A. The cause would have nothing to do with the case whatever; the fracture alone would be to deal with.

Q. You have no idea, Doctor, when the fracture occurred, from your examination?

A. No, sir; I could not state the time; I could not pretend to state the time.

Q. Is it the legitimate result of a fracture of the collar-bone or clavicle that the arm motion or movement of the arm is affected?

A. It is the strength of the arm that is impaired.

Q. Always?

A. No; not always; where there is an imperfect union, the strength and usefullness — the limb are very materially impaired.

129 Q. Is it not slightly impaired, in any event?

A. Not if a good union was secured.

Q. You say good unions are not so frequent as they ought to be?

A. I say bad unions are not always the result. In many cases the union is perfect.

Q. You speak of an examination you made of the chest of this man. Could you state from that examination where this condition had been produced?

A. I could not state the time at which it occurred.

Q. It would be impossible for any medical expert to do so, would it not?

A. Yes.

Q. Is it not possible that the fracture of the clavicle may have taken place at one time and this condition you found in the chest to have occurred at a different time?

A. Certainly it would be in the line of possibility.

Q. It might not have occurred from the same cause?

A. Such would be possible. That would be a question on which I could not be informed, not having seen the patient before that time.

Q. How many wounds did you find upon the scalp?

A. I found two which seemed to be of any size. There may have — other little wounds which did not attract attention, and to which I paid no attention.

Q. Did you find indications of other wounds upon the head?

A. I cannot say that I did. He told me at the time that he had others.

Q. So far as your examination went, you found indications of only two wounds upon the head?

A. Only two; yes, sir.

130 Q. What was it you said in relation to the elevation of the bone?

A. I found a slight elevation of the bone corresponding to the wound.

Q. Doctor, is not that quite common in blows upon the head?

A. It is common when the bone is affected, but if it was not affected there would be no wound. If it was simply a scalp wound the bone would not be affected.

Q. As a matter of fact, may that not also occur when the bone is slightly affected without any fracture at all?

A. It could, yes. There could be an injury sufficient to cause the substance of the bone to be elevated.

Q. Would you undertake to say, Doctor, from your examination you gave this scalp wound that the blows received were sufficient to have caused or would have affected the internal portion of the skull?

A. That they did?

Q. I ask if you would unde-take, as a medical expert, to say that the blows received, that caused this scalp wound which you found — examination, would have fractured the skull internally.

A. I would not say that they would have, but I would state that they might; that such condition might have occurred.

Q. As a medical expert, you would not say they did?

A. I would not state positively that they did.

Q. Did you, Doctor, from any of the examinations you gave the patient in September discover any indications of this blood rushing, of which he has spoken, in his head?

A. He complained of——

Q. I understand his complaint. Did you see anything that would indicate to you such result—such a state of affairs?

A. That is something you must rely certainly on the state-

131 ment of the patient.

Q. You remember when I commenced that I asked your means of ascertaining what you learned from the patient and what you learned as a medical expert?

A. Yes; opinions are nearly subjective.

Q. You found nothing from your examination indicating that character?

A. Certainly.

Q. How about the dizziness?

A. It was a question of the patient's statements.

Q. You had to entirely and solely rely upon the statements for these two things?

A. Yes, sir

Q. Namely, the dizziness and the blood-rushing. Did you, Doctor, from any examination you gave the patient at the time, find anything that would prevent rapid locomotion?

A. Rapid locomotion?

Q. Rapid locomotion.

A. Well, the question is a little peculiar.

Q. I know it is.

A. I did not find anything in the—I did not find anything that would prevent rapid locomotion.

Q. The ribs, you say, on the left side, you say, you found two that had been broken?

A. I did; yes, sir.

Q. From the examination, had the fracture been healed?

A. There was a union.

Q. The union had taken place?

A. Yes, sir.

Q. What can you say with regard to the union; was it a
132 a good or perfect union?

A. The union in that case was as good as you ordinarily get. In this case, of course, with a fractured rib it is different from a fracture in most parts of the body, inasmuch as when you restore it to its place it cannot be splinted.

Q. So that it was as perfect a union as these unions usually?

A. Yes, sir.

Q. You know nothing about this pricking sensation except what the patient told you?

A. That is the statement of the patient.

Q. From your manipulation did you make any discovery that would indicate a thing of that kind?

A. Yes, I did.

Q. From your manipulation you found something that indicated that; what was it, Doctor?

A. I found a dullness on percussion of the left lung.

Q. From that you concluded that there was some trouble in the rib originally?

A. I did.

Q. Would that necessarily result, Doctor, with dullness; might it not be occasioned from some other cause?

A. It might have been occasioned from some other cause than fracture of the rib or spicula of the bone, but there was a cause for that dullness.

Q. That was the only reason you have for thinking there may have been a portion of the bone sticking out internally?

A. That was the only reason, yes; that is, I mean aside from the patient's statements. I always take the history of the case into consideration.

Q. Yet you as a medical expert state that there would be other causes that would bring about the dullness of that left lung.
133 A. Certainly.

Q. Now, Doctor, taking the matter as a whole and from the examination you gave, will you undertake to say as a medical expert—mark you, from your own examination, leaving aside the statements of the patient—would you undertake to say that you discovered any permanent injury at all?

A. Yes, I did.

Q. If so, what?

A. The facture of the clavicle is a permanent injury. The condition of his chest is an injury—permanent injury. His chest is considerably flattened in the left breast, and I wish you to understand that in making this statement, when I say permanent injury I don't state what that injury was produced by; that these injuries are permanent. The cause was unknown to me.

Q. You are speaking simply from your manipulations and examination at that time?

A. Yes, sir.

Q. You don't know anything about when these various injuries occurred?

A. No, sir.

Q. Or whether they occurred all at one time, or one at one and another at another?

A. No.

Q. They may have had different causes?

A. Yes; I could not tell from examination.

Q. Would you undertake to say, Doctor, as a medical expert, that permanent disability would necessarily result from such injuries?

A. I would; yes.

134 Redirect examination.

(REAVIS:)

Q. These permanent injuries, Doctor, that you mention, about the clavicle and the sunken breast, the flattened breast, were produced by violence, were they?

A. That would be my judgment.

Q. You said in answer to the question of counsel that the physician who treated the patient understood you to say that he mentioned some of the symptoms to you?

MITCHELL: We object.

The COURT: I did not hear anything of that kind.

Q. When did you last examine the plaintiff, Doctor?

A. Last evening.

Q. You may state if the examination of last evening agreed with the results of your examination in September?

A. They did.

135 H. S. HUSON, a witness called for the plaintiff, after being duly sworn, testified as follows:

(REAVIS:)

Q. What is your residence, Mr. Huson?

A. I live in Tacoma now.

Q. What is your occupation?

A. Civil engineer.

Q. State what, if any, position you hold on the Northern Pacific Railroad Company.

A. Principal assistant engineer, in charge of construction.

Q. State if you held that position last April.
A. I did not.
Q. What was your position on the 21st of last April?
A. I was engineer of the Cascade division.
Q. That included Kittitass county, did it?
A. Yes; Pasco to Tacoma.
Q. Did you know the time schedule on which the trains of the divison ran, Mr. Huson?
A. Yes.

(Paper shown witness.)

Q. Iwill ask you to examine this?
A. That is not the schedule.
Q. Have you the schedule, Mr. Huson?
A. I have not it in my possession here.
Q. Do you know who has it here?
A. I do not.
Q. Now I will ask you to state what the regylations were at that time, and if these regulations applied at that time—that is, not the time, bu- the other regulations.
A. The regulations on that card?
Q. Yes.
136 A. Some may have been in effect and some may not. That card, as a card, was not in effect or anything on it.
Q. Now I will ask you——
A. What I mean to say is, there may have been regulations printed on that that would coincide with the regulations which we were using, but at the same time they would not be taken as a guide.
Q. Look at rule No. 96 and state wh-ther that was in force at that time.
A. I could not swear to it, if it was. If it happens to correspond with the similar regulation in the book of rules, it was in force; otherwise not.

(The schedule referred to by counsel was No. 9.)

Q. Look at 96 and 99 of this book.

(Book handed witness.)

A. Well 96 and 99 of that book was in force. If the similar numbers in the schedule correspond with that they were in force, but not by reason of their being there, but by reason of their being in this book.
Q. Then the regulations prescribed in that book of rules were in force, were they?
A. In so far as they relate to construction. You understand that that book was gotten up for transportation. Construction is not transportation. In so far as the management of trains on construction correspond with the management of trains upon operation in transportation of freight and passengers, in so far are they adopted and were they adopted by me.
Q. Look at 47 in that book and state whether that was in force at the time.

A. That was in force as far as it was practicable. Rules upon construction cannot so readily be carried out as those upon
137 operation, where every facility is afforded. Every sort of sign and device is perfected upon operation. Upon construction these signs and devices are not perfected; they are in process of construction, and cannot be had at that state of perfection which they are embodied in that book of rules; therefore the strict construction of that book of rules applied to the operation of construction trains cannot be had.

Q. I desire him to read No. 47, which he stated to be in operation at that time.

The COURT: What is this for?

REAVIS: It is for the government of the road.

WITNESS: I say they are used, with the modification that I made in my answer, as far as practicable, as far as the appliances we had to use them.

Q. These were the general rules that controlled you?

A. Yes, sir.

REAVIS: I will read rule 47:

"Flagging against trains means a man ahead of the train ¾ of a mile with danger signals. Those giving signals must locate themselves so — to be plainly seen and make them in such a manner as to be readily understood. The utmost care must be exercised by trainmen, etc."

Q. The first sentence means trains that are in operation?

A. It means that under certain conditions the flagman should be three-quarters of a mile ahead of the train.

Mr. REAVIS: Rule 96 reads as follows:

(Reading same from book:) "When a flagman is sent out to signal any approaching train he must, if possible, avoid stopping on a curve or behind any obstruction, endeavoring to pass beyond the same, should such exist, and reach a position where he can be clearly seen from the approaching train for at least one-fourth of a mile.
The conductor must know that his train is fully protected
138 in both directions, and he will be held responsible if any accident occurs from want of any precaution that could have been taken."

Q. Now, the next rule is 99:

"Trains are to be run under the direction of the conductor, except when such directions conflict with these rules or involve risk or hazard, in which case the engineer will be held equally responsible."

Q. That is the same regulation that is on the time card?

A. I could not swear whether these were in force or not. That is not the card that is in operation. These are simply rules that are laid down by the superintendent or person in charge of the work.

Q. Do you understand that order?

(Train order handed witness.)

A. Yes; I understand it.

Q. "Run from Easton to Cle-Elum wild; flag against Hulett work-train between Cle-Elum and Nelson siding." What did that order to flag against the work-train mean?

A. It meant simply to run to Cle-Elum, and that they were liable to find Hulett somewheres between Cle-Elum and Nelson's siding, and that they should flag a-inst him on these limits.

Q. What does a lookout order mean, Mr. Huson?

A. Well, my understanding of a lookout order is that it does not mean much of anything, except that it posts the other party; it is merely a warning, but it does not mean anything beyond that. That is my understanding.

Q. To who is the lookout order generally given when trains are in motion?

A. It is given to the party who has a right to the road, and it is given or not given, as the train-dispatchers may think best, as he may feel inclined.

Q. Do you recognize the train-dispatcher who sent this order?

139 A. Yes, sir.

Q. Who was it?

A. It was Mr. Murry.

Q. Where was the train-dispatcher?

A. At Easton, in charge of construction. You understand that a lookout order is something in the nature—if you were to explain to a man or instruct a man the road from here to the old town, and you told him that there was a bad rut down here, for him to look out for it; you might in your direction tell him to look for that, and you might not.

Q. That would be a matter in the judgment of the dispatcher?

A. Yes, sir.

Q. Now, what do the rules require with reference to the speed of trains?

A. The rule in reference to trains is 18 miles an hour; that was the rule at that time.

Q. Now, is there any duty that the lookout order imposes with relation to the speed of the train in coming to bad places or curves or dangers?

A. I don't understand that there is; that is my judgment. You understand that I am not an expert train-dispatcher. While the general features of the train order I thoroughly understand, there are intricacies with regard to train-dispatching and train-work which only trainmen and train-dispatchers only know. They make that their study for years.

Q. I suppose that the opinions held by you on that are tentative; that is, they are changeable with information—that is, they are not fixed with reference to lookout orders?

MITCHELL: We don't think it is proper for counsel to cross-examine his own witness.

The COURT: He has a right to get the opinion.

A. Well, they are fixed, so far as the significance on that
140 order is concerned. So far as what the trainmen would do under those orders might be changed according to the trainman.

Cross-examination.

(MITCHELL:)

Q. You were engaged in construction at that time, I believe?

A. Yes, sir.

Q. Between what points did that construction extend during the month of April?

A. The construction trains were running at that time between Cle-Elum and some point on the switch-back. Some variable point as the work was pushed further on the switch-back.

Q. This time-card here that was shown you does not purport to be any portion of the road from Cle-Elum to Pasco?

A. That is all. That was in operation between Cle-Elum and Pasco.

Q. It had nothing to do with the construction?

A. No, sir.

Q. As a matter of fact, Mr. Huson, can you in matters of construction adhere strictly to this book of rules?

A. No, sir; we cannot.

Q. Are there not orders given in connection with construction and the running of trains that are not necessary in the operation of the road?

A. Yes, sir.

Q. That occurs from the necessity of construction work?

A. Yes, sir.

Q. That order that has been shown you, what is that called?

A. That is called a special order, a running order.

Q. Now, you have orders on construction that are called work-orders?

A. Yes, sir. These work-orders may last for any number of days or hours.

Q. They may cover quite a number of trips, may they not?
141 A. They may; they may last a whole week.

Q. Is it possible under such orders to comply with this book of rules that was shown here?

A. No, sir; not to comply strictly. The book of rules is held up as a sort of standard to work to as far as circumstances will permit.

Q. You don't pretend to have any extensive knowledge on train-dispatching and running of trains?

A. No, sir; I am not an expert trainman.

Q. These orders are given to both the conductor and engineer, are they not?

A. Yes, sir.

Q. Can an engineer leave a station, either an operator's station or train-dispatcher's station with his train before he gets the order, even if the conductor has one?

A. No; he has to have an order.

Q. Both have to have orders?

A. The orders are given together.

Q. They are given to the engineer and conductor?

A. It would be impossible for a conductor to get an order without the engineer.

Q. What time did they begin to operate trains on the road between Cle-Elum and Easton or Martin?

A. The first operation was July fourth, the first operating train went over it.

Q. All the trains that went over that previous to that time were construction trains carrying material?

A. Yes, sir.

Redirect examination.

(REAVIS:)

Q. Were the conductors and engineers of these trains relieved by the defendant after the collision?

142 MITCHELL: We object; it is immaterial.
The COURT: Objection sustained.
REAVIS: Plaintiff rests.

143 Defendant offered the following evidence:

H. S. HUSON, called on behalf of the defense.

(MITCHELL:)

Q. You have already testified that you were the principal assistant engineer, and was at this time in charge of the construction?

A. Yes.

Q. From Cle-Elum and Easton and across the mountains?

A. Yes, sir.

Q. State, if you please, if the plaintiff in this case was employed by you or your company for any purpose under your direction.

A. He was employed as a laborer in the surfacing gang.

Q. Between what points?

A. At that time we were working between Cle-Elum and Nelson's, I suppose. They were in reality working between Cle-Elum and Martin, subject to orders to go to any point between these places.

Q. How were they carried to and from their work?

A. Upon construction trains.

Q. Were they charged any fare for their transportation?

A. They were not.

Q. What arrangements were made for that?

A. Nothing but the usual arrangement, that the wages paid included the price for riding on the train to and from work.

Q. This train that carried them out was provided for that purpose?

A. Yes.

Q. Now, you may state whether the flat car was pushed in front of the train; why it was pushed in front of the train, when it was pushed out on this occasion?

A. A car is frequently placed in front of the engine to be used in coupling onto other cars.

Q. Where would it be necessary to couple onto other cars?

144 A. In reaching into gravel beds to pull gravel out, the engine could not be taken in and coupled; and you cannot always have your cars coupled on behind your engine. You must take your cars as you are able to get hold of them, and for that purpose the car is frequently placed in front of the engine.

Q. Always carry a caboose on the engine taking men to work?

A. Yes; and frequently at imperfect sidings it is necessary to have cars in front to run in and take the cars out.

Q. Was there any one in the caboose attached to this engine for the men to ride in?

GRAVES: I don't think he stated that he knew anything about this train.

The COURT: If he did not he will state it.

Q. You may state whether you know.

A. Well, I know nothing of this particular case, except that a caboose is furnished where men can ride in a caboose. It is usual to furnish a car in addition.

Q. What kind of a car?

A. A box car.

Q. Do you know of any orders by the company prohibiting the men fro- riding to work in a caboose?

A. Of my own knowledge I could not say. I would state that it is a sort of a common law among railroad men and employees that they are not allowed to ride upon open cars.

Q. I mean about riding in a caboose.

A. They are to ride either in a caboose or box car.

Q. How long had this piece of road between Cle-Elum and Easton been in process of construction before the time of this accident, in April?

A. Well, I could not state definitely without reference to the records—probably from the November previous—in that vicinity.

Q. Do you know where this curve is which has been testified to in evidence?

145 A. Yes, sir.

Q. How many curves are there between Cle-Elum and Easton?

A. Well, I could not state. There is quite a good many that are between them. Between that particular curve and Nelson's there are two; between that curve and Easton there are four; between where that collision occurred and Cle-Elum there are quite a number. I could not state how many.

Q. What was the condition of the track and curves around these curve- at the time of the accident?

A. It was in good condition. It had been just put up and was in nearly as perfect condition then as a track often gets.

Q. Who employed and paid these laborers that were doing the surfacing?

A. Well, that is rather a difficult question. I might say that I did. I had other agents under me.

Q. Their time all came to you?

A. Yes; their time came to me for approval.

Q. Now, these men who were on those trains that day, were they engaged in the construction work?

A. I don't clearly understand your question.

Q. I mean to ask you if the conductor and engineers and brakemen on these trains were employed by you.

A. The train was supposed to contain no one but employees.

Q. In connection with that work?

A. In connection with the particular work of construction.

Q. Now, this train with Hulett as conductor and Swain as engineer, what work were they engaged in doing?

A. That train on that particular day was hauling gravel, and also carrying the men to and from work.

146 Q. Had been engaged in that some time?

A. That had been their regular work some time.

Q. This other train that was coming down from Easton was also working with them in construction?

A. Yes, sir.

Q. Did you see Mr. O'Brien at the time he was injured or shortly afterwards?

A. I saw him the next day.

Q. Who were the physicians who waited on him—attended on him?

A. There were a number. All the physicians we could get in the country—that is, the leading physicians of the country. Dr. Morrison, Br. Beebe, and Newlin, from Ellensburgh, were brought up; Dr. Beam, of Ellensburg; Dr. Harris, the N. P. Coal Company's physician at Roslyn, was brought down, and the local practitioner at Cle-Elum was called in—Wheelock.

Q. Who was the physician that attended him particularly during his illness?

A. Well, they all did. They were all called in at first. Later on Drs. Beebe and Newlin had the patient's particular charge. Dr. Mills, of Missoula, the company's physician at Missoula, was brought here as quick as he could come. He also examined all the patients and took such of them as were able to go to Missoula and treated them there.

Q. How long have — been connected with the construction work of railroads?

A. With the Northern Pacific?

Q. All railroads—in the construction work.

A. Ten years; not quite. Now, it is nine years.

Q. Have you ever in any of your construction work found that rule as applicable to operation apply to construction closely—could be made to apply to construction in all particulars?

147 A. No; not in all particulars. I find that as a general thing that in operating one road that it is my custom to adopt the rules of that road, because the men employed by me are mostly men trained upon that road. The men that I employ upon my construction work are likely to be men who are familiar with the construction of that road. The rules are adopted as a sort of moral, simply to make the men as observant and careful as possible.

Q. Have you known Mr. O'Brien before this accident—that is, saw him at work?

A. His face is familiar to me. I don't know that I could have called him by name. His face has been familiar to me for some time. I could not say how long; maybe some months; maybe three or four years, for all I know.

Q. Are construction trains confined to any particular speed in running.

A. They are, as far as practicable.

Q. Well, is it always practicable to confine them to any particular speed?

A. It is not practicable to confine any train to any particular speed. The fact of it is it is almost a physical impossibility to find how fast the train is running—that is, by observations. You can tell the speed that a train will exceed the speed laid down in the schedule. A train is given an order to run fourteen miles an hour from Ellensburg to Cle-Elum. That means that the total time between those points shall come up to that. There may be portions of the road that will travel seven or eight miles an hour; other portions of it may travel enough faster than fourteen miles an hour to keep it up within that limit. Where a train is limited not to exceed a certain number of miles per hour they expect to keep within it, and reckless running, absolutely reckless running, would be

148 punished if it was so apparent that any could tell that anybody was running faster. It is more difficult to tell how fast a train is running. Unless you compare it with the actual miles and measurements, observation will not tell you how fast the train is running. There is a test that I have found is absolute, but I do not suppose half a dozen trainmen in the country know of it—that is, by counting telegraph poles and multiplying by two you get the exact distance in minutes; multiplying by two will give the distance in miles per hour.

Q. What is the distance from Cle-Elum to this curve that has been testified about?

A. I think it is somewhere near three miles.

Cross-examination.

(REAVIS:)

Q. You mean, Mr. Huson, that the wages paid these workmen included the price of their transportation?

A. Understand me, I do not mean to say that there is any agreement.

Q. There is an implied understanding that they should be carried backwards and forwards?

A. Certainly.

Q. You say the track was in nearly perfect condition where these trains were running?

A. Yes, sir.

Q. That was all finished, complete?

A. The track was.

Q. Trains ran over that frequently?

A. Yes, sir.

Q. What kind of trains ran over the track?

A. Construction trains, only trains carrying gravel, trains carrying empty cars, and trains carrying supplies and material.

Q. Trains carrying no freight?

A. They carried contractors' freight.

149 Q. Contractors paid for that carriage, did they?

A. No, sir; contractors did not pay for that; it was absolutely free to them.

Q. Carry any other freight?

A. We did when presented; you might say we carried freight.

Q. Where did you carry that too?

A. We carried it to wherever it was billed along the road.

Q. Along the road, above Cle-Elum?

A. We carried freight as it was convenient for us to do so. I didn't advertise to carry freight. I did not carry freight unless it was our convenience to do so.

Q. You did carry it and were paid for carrying it?

A. Yes, sir.

Q. Now, you have people passing along there, up and down on these trains, other than employees?

A. Certain trains were allowed to carry people, for which people paid.

Q. You did carry passengers?

A. Yes, sir.

Q. That was over the line of road from Cle-Elum to where?

A. Between Cle-Elum and Martin.

Q. That was about what distance above Cle-Elum?

A. 21 miles.

Q. And the road was in sufficiently good condition for trains to run over all that way, was it?

A. Certainly. As soon as the track was down it was good enough for the train to go over.

Q. It was in good, safe condition?

A. No, sir; I did not contend it was safe to run over with great speed.

Q. Not with great speed, but with ordinary speed?

A. It was safe for a train to go over.

150 Q. And the speed of your trains was regulated by the kind of track they had to run over, was it not?

A. That was it exactly.

Q. These were the orders, were they not?

A. It was implied orders.

Q. Now, then, a train would not run very fast on a bad portion of the road, not as fast as they would over good portions, would they?

A. No, sir.

Q. Now, would a train run over this road as rapidly as a train from Ellensburgh here?

A. Over certain portions of the road we could run fully as rapidly as we could on any road.

Q. That was a very good road?

A. Yes, sir.

Q. Now, Mr. Huson, the men who worked on this Cascade division, their time was returned to you?

A. Yes, sir; there time was returned to me and I put it in proper form. The checks were drawn in St. Paul and drawn subject to my order.

Q. They did not work under your personal supervision, did they?

A. Not all the time, of course.

Q. You had other men who were bosses of these gangs, did you?

A. Yes, sir.

Q. Who was the foreman of this particular gang?

A. James Abercrombe.

Q. He was employed by you and worked there for that purpose?

A. Yes, sir.

Q. Now, Mr. Huson, you stated that you had considerable experience in the construction of railroads.

A. Yes, sir.

151 Q. You have had considerable experience in ordering trains, have you not?

A. It depends upon what sense you place you question. I have had experience in the general management of trains.

Q. You know how they should be run?

A. Yes; but the specific management of trains is always entrusted to the train-dispatcher and men who are trained in that particular.

Q. Now, was there a Y at Cle-Elum or side track on which a train could turn, turn round or be reversed?

A. Yes, sir.

Q. Now, if this car in which these men were riding had been behind Hulett's engine instead of before, would not their safety have been much greater?

A. In this particular instance it would.

Q. Would it not, generally, in a collision with a train, in any direction?

A. Generally speaking, it would, with a train going in that direction; but you understand if it was before going in one direction it must be behind going in the other. It is a double-action thing—in

other words, it was in operation on a straight track. When it went up before it would come back behind.

Q. This train, when it was at Cle-Elum at noon, could have reversed the car?

A. Yes, sir; but when it came back it would have been just as bad; it would have come back the other way. The case is as broad as it is long.

Q. Doctor Morrison, you say, was at the Reed house where this patient was?

A. Yes, sir.

Q. What has Dr. Morrison's relation to the company been for the last year or two?

152 A. None whatever. He has been working for the contractor.

Q. He is the physician for who?

A. He was the physician for Nelson Bennett; he was also the physician for Smith and Hale in their contract.

Q. Who is Dr. Harris?

A. Dr. Harris was physician for Northern Pacific Coal Company.

Q. Now, do you know how long the Doctor remained there?

A. I don't know.

Q. Do you know that he was very drunk when he was there?

A. I do not.

Q. How long did you see him there?

A. I did not see him there at all.

Q. You knew he was there?

A. I knew that he was there because I paid his bill.

Q. You paid the bills of all those physicians who went there?

A. Yes, sir.

Q. Now, is it not the most usual and frequent occurrence in gravel trains to put the men on the flat car? Is it not usual the way they are seen riding up and down the road?

A. I think it is, and it is not. It is a question that should be answered by both yes and no. When riding a short distance they frequently ride on top of the material; when riding a considerable distance they are supposed to go into a place provided for them. Probably the general impression may be that they usually ride on the flat car. It is the general impression; they are generally seen that way, but that is only in making short runs.

Q. The rules of transportation you have mentioned were adhered to as closely as possible, were they not?

A. Yes, sir.

Q. Were there any reason for non-adherence to these rules in this particular instance?

153 A. Well, I don't know that there was, particularly.

Q. Now, Mr. Huson——

A. That is about the rules I stated.

Q. Did you not consider there was negligence there?

MITCHELL: We object to that.

The COURT: Objection sustained.

Q. Now, how do most men distinguish the speed of a train—that is, most railroad men on a train?

A. I should judge by simple appearances, and those that have had the most experience could give the nearest guess.

Q. You say reckless running is punished?

A. It is; absolutely reckless running would be punished by removal.

Q. Were these conductors of train- subjected to any punishment by the company?

MITCHELL: We object.

The COURT: I will sustain the objection.

Q. What kind of a curve is that where occurred the collision?

A. It was a ten-degree curve—that is, it deflected from a straight line ten degrees in a hundred feet.

Q. How far on that curve could a train on the track be seen—that is, say, two hundred feet of the point of the curve?

A. Well, in the abstract you could see about three hundeed feet on a curve of that nature, where the side of the bluff had been taken out for ten feet from the center of the line. In other words, the middle ordinet- of the curve would permit you to see the center of that curve about three hundred feet with a middle ordinet- and ten feet off the ordinet-. That is given where there is an obstruction in the road. In this particular curve there was only about three hundred feet of such obstructed vision. The balance of the
154 curve you could see right across.

Q. Where was that 300 feet?

A. That was in the western end of the curve, covering a portion of the curve of probably not over about 300 feet. After you had started from the western end of the curve and gone up three hundred feet you could see across the whole curve, and see a train coming some considerable distance, because it was an open country, and there was nothing on the curve to obstruct the vision.

Q. That was the eastern end?

A. Yes; but on the western end there was a bluff, about eighteen or twenty feet high. There is also but one curve in that vicinity. The diagram, which some one drew, was incorrect in that. I think some of the testimony has been mixed in that. There is but one curve there. It is a simple curve, bending in one direction, with a straight line extending from the curve, in both instances, nearly half a mile, or half a mile each way from the curve. There is no reverse curve there; it was a simple curve, and but one.

Q. Where, at that time, was the first side track east of that curve?

A. To answer your technically, the first side track east of that point was Cle-Elum.

Q. Where was the first one on the west side?

A. Nelson.

Q. How far?

A. About three miles—two or three miles in either direction.

Q. Do you know the orders under which the Hulett train was running?
A. Yes, sir.
Q. What were they?
A. Their orders were that day to work between Cle-Elum and Easton. I say I know the orders. I know the general orders under which they were working. I could not give the exact orders
155 between those points. They had the right of way.
Q. They had had such orders for some time, had they?
A. Yes, for some few days.
Q. They had been running up to where they worked and back?
A. Yes, sir.
Q. As they had on that day regularly for some time?
A. Yes, sir.
Q. Do you remember, Mr. Huson, about the time of this collision of making any declarations in Cle-Elum as to its causes?

MITCHELL: We object. It is not shown to be *res gestæ*. There is no time stated. The witness has not stated that he was there at the time of the collision.

The COURT: I do not suppose it was asked because it was part of the *res gestæ*. Mr. Reavis probably thinks the company is bound by the declarations of their agent.

Mr. REAVIS: I will withdraw the question and ask a preliminary question.

Q. Were you there about the time of the collision?
A. I was there the next day after the collision.

REAVIS: I will withdraw the question.

CLAY SWAIN, witness called and sworn on behalf of the defendant.

(By Mr. MITCHELL:)

Question. What is your occupation, Mr. Swain?
A. Engineer of locomotive.
Q. How long have you been a locomotive engineer?
A. Well, going on two years.
Q. Where were you employed, and by whom, on the 21st day of April last?
A. I was on work train west of Cle-Elum.
Q. How long had you been running there as engineer?
A. Well, I could not say exactly as to the number of days.
156 I had been there all along in March, and then I was back to Ellensburg for a few days; then back again. That was the second time I was back—back on the 20th.
Q. You had been running there before in March?
A. Yes; right out of that same gravel bed.
Q. What were you carrying?
A. Well, we were carrying gravel from Cle-Elum and working there.

Q. Took the men out in the morning to their work?

A. Yes; out in the morning to their work; in to dinner, and out again at 1 o'clock, and in the evening.

Q. Do you know a man named Tim Bowman?

A. Yes; I known him.

D. Did you see him on the 21st day of April last?

A. I did.

Q. Where did you see him?

A. I saw him in Cle-Elum; in fact, I saw him in the morning when we started away.

Q. Where was he when you saw him?

A. He was coming out and starting to get on the flat car. I halloed to him and told him to go back in the caboose.

Q. What was the occasion of you telling him to go back in the caboose?

REAVIS: We object.

The COURT: I think the question is proper.

A. I saw that he was little drunk and staggering, and I thought that he might roll off the flat car.

Q. You may state what his condition was as to being sober or drunk.

A. I seen him taking some drinks of whiskey, and seen that he was full.

Q. You saw his ability to carry himself in walking to get on to the train?

157 A. I don't known whether he got up on the flat car; he was like a drunken man, staggering around.

Q. Now this caboose. He got on the caboose, did he?

A. Yes, sir.

Q. Now this engine; that was in front of the caboose, it was between the caboose and flat car, was it not?

A. Yes, sir.

Q. Could a man standing on the front steps of the platform of the caboose see the flat car in front of the engine?

A. He might see the edge of it.

Q. Could he see a man sitting on it?

A. Now, if they were in the middle or the other side he could not see them.

Q. Was Mr. Bowman in such a condition that he could have told anything about the speed of the train that day?

A. Well, it is rather hard to say; I never was drunk very much myself; I have been drunk a few times, and I did not know very much about what was going on.

Q. Mr. Bowman was employed in surfacing up the track?

A. Yes, sir.

Q. Had you known him to ride on the caboose before?

A. Well, I don't really know whether I did or did not; I can't say as to that.

Q. He went back there by your orders?

A. Yes; I directed him back there.

Q. Were the other men going up to work who were in the caboose or on the caboose?

A. Well, I ain't sure about that; I know there has been times they used to ride in the caboose.

Q. They rode in the caboose just as freely as anywhere else?

A. I never heard anything different from that.

158 Q. Do you know as a fact where these men preferred to ride?

A. No, sir; I do not. I suppose they had their choice where they could ride.

Q. Where did they usually jump on when the train came along?

A. They usually got on the cars ahead or wherever the cars were—either behind or ahead, either one way or the other, either going out or coming in.

Q. Do you know of any orders prohibiting them from riding in the caboose?

A. No, sir; I do not.

Cross-examination.

Questions by REAVIS:

Q. What time did you leave Cle-Elum on the day of the collision?

A. 12.47.

Q. What time did the collision occur?

A. At just about exactly 1 o'clock.

Q. About three minutes after you left?

A. No, sir.

Q. Or about thirteen minutes previous? Who was your conductor?

A. Pat. Hulett.

Q. Where was Hulett on the road from Cle-Elum till about the curve?

A. Where did he ride at this particular time?

Q. Yes, sir.

A. I am not able to say exactly just where he did ride.

Q. Did you see him?

A. No, sir.

Q. Did you know anything about his condition as to drinking?

A. No, sir; I don't know.

Q. Did you see him drink any that day?

A. No, sir.

Q. I will ask you if you saw him drinking about that time?

A. No, sir; I did not.

159 Q. Was he in the habit of drinking?

A. I have seen him drink some, perhaps—four, five, six, eight, or ten months before that.

Q. I mean about this time.

A. No, sir; I did not.

Q. What orders were you running under, Mr. Swain?

A. Work orders.
Q. State what they were.
A. Working between Cle-Elum and Nelson.
Q. Get any orders with reference to any other train?
A. No, sir; we had orders to look out—had lookout orders.
Q. What did those lookout orders mean?
A. Well, the real meaning—I took the lookout order—it has no real meaning, but to keep a lookout if you pass any flag, or something to that effect.
Q. It's a kind of warning, is it?
A. Yes, sir.
Q. Have you ever been railroading since the 21st of April?
A. Yes, sir.
Q. Where?
A. On the Cascade.
Q. What particular point?
A. From Ellensburg to Heron, Montana, and between those points.
Q. Are you now in the employ of the defendant?
A. Yes, sir.
Q. How much have you done since the 21st of last April?
A. I think I have made with an engine about thirteen hundred miles and dead-headed about two hundred and thirty miles.
Q. When did you do that?
A. I did that since the Ellensburg court.
160 Q. You were not working between the interval of the collision and the Ellensburg court?
A. No, sir.
Q. Now, when was the Ellensburg court?
A. Well, it set on the 26th day of September.
Q. Now, where were you at the time this collision occurred?
A. I was on the engine, on the right-hand side.
Q. Where did the collision occur—at what particular point?
A. Well, it occurred on a ten-degree curve, west of Cle-Elum.
Q. What part of the curve?
A. It didn't occur on any part of the curve?
Q. Past the point?
A. Just on the end of the tangent, on the end of the curve.
Q. Now, how far was the colliding train west of you when you saw it?
A. Well, I would think it was about 300 feet.
Q. Did you observe the flagman?
A. Yes; I saw a man running from behind the point.
Q. How far down did he get from behind the point?
A. Well, he just came from behind the point as I came close to it.
Q. You passed him, did you?
A. Yes, sir.
Q. What did he do?
A. He was giving a signal to stop.

Q. When you passed him what position did he take when you passed him?

A. I didn't notice; he was outside of the curve.

Q. Was he close to the telegraph pole?

A. Well, I am not able to say just as to that.

Q. Was he off, down the embankment?

A. No, sir; he was off the end of the ties; he was outside of it.

161 Q. Then you passed the point of the curve?

A. Yes, sir.

Q. You saw him just at the point of the curve?

A. No, sir; just a little this side.

Q. How far?

A. Perhaps fifty or sixty feet.

Q. When did you see the other train?

A. I saw the other train there five seconds after I saw him.

Q. Right where?

A. Well, it was about three hundred feet from me—two hundred and eighty or three hundred feet.

Q. When you saw it?

A. Yes, sir.

Q. Now, how long from the time you saw him fifty or sixty feet from you until you saw the other train?

A. From the point of the curve it must have been eighty feet from me.

Q. How long from the time that you saw him till you saw the other train?

A. It could not have been more than a very few seconds; I could not say exactly the number.

Q. What did you do when you saw him?

A. I reversed the engine and plugged her.

Q. How far did you run?

A. I run until I struck the other train.

Q. What occurred then?

A. Well, I saw it struck a little hole in the tank and stick the car in there. My engine trucks went off the track. I saw the men jumping off.

Q. Did you see any dead men?

162 A. Yes, sir.

Q. How many?

MITCHELL: We object.

The COURT: You have proven seven men were killed there. This witness has only testified in relation to the condition of the witness Bowman at the time he left there.

Court adjourned till one-thirty p. m.

The court reconvened at 1.30 p. m.

CLAY SWAIN recalled.

Questions by Mr. MITCHELL:

Q. You may state, Mr. Swain, whether you are able from your experience as a railroad engineer to tell at what rate of speed you were running at any time on the road while running an engine.
A. Yes, I know, about.
Q. Well, from what you know and your experience and from the facts, what can you say as to the rate of speed you were running when you struck that curve on the 21st of April?
A. I think about 18 miles an hour.
Q. What rate of speed were you running when you came to the point of the curve?
A. Well, I think, about twelve miles an hour.

Cross-examination.

Questions by REAVIS:

Q. Did you testify so before the coroner's jury?
A. Yes, sir.
Q. Did you make any statement there as to the rate of speed your train was running?

MITCHELL: We object; it is not material.
The COURT: Objection overruled.

163 Q. State if you made any declarations there?
A. Yes, I did.
Q. What did you put the rate of speed there?
A. About eighteen miles an hour.
Q. When was that coroner's inquest?
A. I don't know exactly, but I think it was on the next morning after the collision, the 22nd, I think.
Q. Who was the coroner before — you gave your testimony?
A. I don't know his name; some old gentleman, I think.
Q. Who was present?
A. Oh, there must have been a number of persons.
Q. Well, mention some of them.
A. I think Hulett was there, for one, my conductor, and some of the coroner's jury; I don't know their names; I don't know that I know any of them. I know that there was a doctor and druggist, etc.
Q. Was there anybody else there whose name you remember?
A. I don't know that I remember. Mr. Rearden was there, I think.
Q. Any *manyn* other persons?
A. Oh, yes; there were a good many other persons.
Q. That was about the 22nd day of April?
A. I think it was about that time; I am not sure of the date.
Q. Before the coroner's jury?

A. Yes, sir.
Q. In Cle-Elum, in Kittitass county?
A. Yes, sir.
Q. Have you had any conversation about the rate of speed of that train, since you left the stand this morning, with any one?
A. No, sir.
Q. How do — tell the rate of speed of trains?
A. I tell it in different ways—by the cars ahead, and some-
164 times by telegraph poles.
Q. Did you time it?
A. Well, I don't know that I particularly did. Just the usual speed I run, and I never gave it particular thought.
Q. You have run faster than eighteen miles an hour with that train?
A. At that time?
Q. At other times.
A. No, I don't know that I ever did.
Q. Never did run faster than eighteen miles an hour with that train?
A. No, sir; something like that.

O. C. HULETT, witness called in behalf of the defense, and, being sworn, testified as follows:

Questions by MITCHELL:

Q. What's your occupation, Mr. Hulett?
A. Conductor on railroad.
Q. How long have you been engaged in railroading?
A. About seventeen years.
Q. What different capacities?
A. Brakeman and conductor and yardmaster.
Q. Where were you employed, and by whom, on the 21st of last April?
A. Construction department of the Northern Pacific.
Q. Between what points?
A. Between Cle-Elum and Nelson's siding.
Q. What particular runs were you making?
A. I was leaving Cle-Elum in the morning and taking the white men out on the surfacing work, and coming back and taking the Chinamen out to handle gravel; at noon bringing the white men and taking them out to work, and bringing them in at night; afternoons I handled the Chinamen the same as I did before with the gravel.
165 Q. About how far is it from Cle-Elum to where the collision occurred?
A. About two miles and a half; between two miles and a half and three miles.
Q. Do you know Tim Bowman?
A. Yes, sir.
Q. Did you see him that day?
A. Yes, sir.

Q. Where did you see him?

A. I saw him working in the afternoon. I saw him in the afternoon as he was getting on the train. I didn't see him in the forenoon at all, that I remember.

Q. You saw him in the afternoon when you were going out?

A. Yes, sir.

Q. What part of the train did he get on?

A. The forward steps of the caboose.

Q. Did you notice his condition at that time?

A. I could not say what condition he was in. He didn't seem very lively getting on the car. The car was just moving at that time, and I was standing at the side door of the caboose and looking out.

Q. Did you say anything to him at that time?

A. No, sir.

Q. Were there other workmen in the caboose?

A. Yes, sir.

Q. Was there any objection made by you while you was running the train to laborers riding on the caboose?

A. I don't know that I ever made any one get out of the caboose, but I have made them get off of the back platform. They bothered us with the brakes, so that we could not handle the brakes on the *on the* back platform, and I used to make them get off
166 there.

Q. Why was the flat car put in front of the engine?

A. I had a gravel bed arranged in such a way that I could not pull the cars that I had put in there if the gravel bed was full. That day I took it down for the men to ride on. I set in twelve or fifteen cars in the gravel bed. The cars I had ahead of me unloaded and the men rushed upon this head car and I took them down with me.

Q. What time did you leave Cle-Elum?

A. Well, I think we left there as near 12.45, as near as we could. That is the time I calculate to leave there -very day.

Q. What time did you get to the place of the accident?

A. I think it was between 12.55 and 1 o'clock. I looked at my watch as soon as I got off the caboose and it was between 55 and 1 o'clock.

Cross-examination

Questions by REAVIS:

Q. You gave the reasons why the flat car was in front that day before leaving Cle-Elum. Now, *sone* that time has the flat car ever been put in front of that train?

A. I haven't run there since that time.

Q. Do you know wh-ther it is or not?

A. I don't know.

Q. Did you continue on running with that train after that?

A. No, sir.

Q. What are you engaged at now?

A. I am not doing anything.
Q. Have you been running a train since that time?
A. No, sir.
167 Q. Prior to that time had you been in the habit of running that flat car in front?
A. Yes; I ran them all; I ran trains in front.
Q. And up to that time?
A. Yes.
Q. Have you been about Cle-Elum since?
A. Yes; I have been there.
Q. Did you see this work-train go out?
A. Certainly I have seen it go out.
Q. Since?
A. Yes.
Q. As it has been going out, has that flat car been in front or behind?
A. I did not take any notice whether it was or not, whether it had any or not.
Q. The next two or three days?
A. I was not around there the next two or three days.
Q. How long was it before you were around there?
A. Oh, it was probably a month and a half.
Q. And you had never noticed which side of the engine the car was on the train running since?
A. No, sir.
Q. Where were you when the collision occurred?
A. I was in my caboose, sitting in a chair at the side door, on the side of the curve.
Q. Where were you when you first saw the colliding train?
A. I didn't see it till it struck.
Q. Did you see the flagman?
A. Yes, sir.
Q. Where did you see him?
168 A. I saw him when I passed him.
Q. When did you pass him—that is, about how far from the point of the curve?
A. I should say it was about two hundred feet from the point of the curve.
Q. Where did the collision occur?
A. About a hundred feet on the tangent from the west point, or a hundred and fifty feet, maybe.
Q. What was his position? Where was he when you saw him?
A. I saw him there by the side of the dump, by a telegraph pole; he was standing right there on the dump.
Q. What do you mean by the dump?
A. I mean a grade built up.
Q. The telegraph pole was sitting off to the side?
A. Sitting at the foot of it. There was quite a slope there.
Q. Did he have a flag in his hand?
A. No, sir; I didn't notice any flag.
Q. Did the men—the workmen—usually ride on the flat car?

A. Yes, sir; they did.
Q. That was the place they generally rode, was it?
A. Yes, sir.
Q. On all the work-trains?
A. Yes; went there of their own accord.
Q. They all rode there?
A. Very near all of them; some rode in the caboose.
Q. Did you tell them to come in the caboose?
A. I never invited them.
Q. How many men were there on that flat car?
A. I cannot say how many there were on the flat car. I
169 think there — about twenty-seven at that time.

Redirect examination.

Question- by MITCHELL:

Q. Is it usual for brakemen to carry flags?
A. Generally he does.
Q. Can they give signals as well without a flag as with one?
A. Certainly they can.
Q. Is not that frequently done?
A. Yes; very often done; a person goes out in a hurry.

Dr. MILLS, witness called for the defendant, after being duly sworn, testifies as follows:

Questions by MITCHELL:

Q. Where do you reside, Doctor?
A. Missoula, Montana.
Q. What is your profession?
A. A physician.
Q. How long have you been a physician?
A. Since 1879.
Q. State where you were on or about April 21st of the present year.
A. In Missoula.
Q. Well, state if you knew the plaintiff, Mr. O'Brien.
A. I saw Mr. O'Brien on the 26th of April.
Q. Where and under what circumstances?
A. I saw him at Cle-Elum, at Reed's hotel.
Q. State if you made any examination of him.
A. I did; I examined his wounds.
Q. From your examination you made at that time, state what his injuries were.
170 A. He had, to the best of my recollection, two scalp wounds—one probably two inches long and the other an inch—and also a number of contusions on the body, and fracture of the clavicle.
Q. How many examinations did you make of him?
A. I think I only — once.
Q. How thorough was that examination?

A. I gave him a complete examination—very thorough.
Q. All portions of the body?
A. From head to foot.
Q. Where were these scalp wounds on the head?
A. One was on the left and a little posterior and the other to the right and anterior, extending into the forehead, the smaller one a little to the right.
Q. Well, now state what you observed as to this clavicle.
A. He had a simple fracture of the clavicle, near the scapular end. There had been some displacements, but it had disappeared and it was very perfectly adjusted.
Q. Did you notice whether it was shortened in any way?
A. No; it was not at that time.
Q. Did you make any examinations of the chest later on?
A. I did.
Q. What did you find?
A. I found some contusions of the muscles and skin.
Q. How about the ribs?
A. The ribs were sound.
Q. No fracture?
A. No, sir.
Q. State what, in your judgment, would be the effect of these contusions.
A. The contusions would temporarily disable him.
171 Q. Temporarily?
A. But I saw no contusions but what he could recover from speedily.
Q. From your examination can you form any opinion as to the permanency of these injuries?
A. I think he would make a complete recovery. That was my opinion at the time.
Q. Did you see him after that?
A. I met him one time.
Q. Where?
A. In Missoula.
Q. What was his apparent condition?
A. Well, he was very comfortable, apparently. I met him on the street.
Q. How did he seem to move about?
A. He moved very well at that time. He was walking when I met him. He stopped and conversed and said he felt sore, but said he was getting strong.
Q. Did he say anything about his collar-bone at that time?
A. He said that he felt quite strong, but was quite sore.
Q. Did he say anything about the fracture having united?
A. He said that it had united and was quite strong, but that he felt sore yet.
Q. When was that?
A. That was in May. I don't remember the exact date; it was in May.
Q. Do you know what time he left the hospital there?

A. No; I did not.
Q. Now, these wounds on the forehead, what did they amount to?
A. There was simple scalp wound and incision of the scalp.
Q. What effect would that have on his physical condition?
A. I think that would probably unite in four or five days. It was well on the way towards uniting then. It was well on
172 the way when I saw him and doing nicely.
Q. Doctor, could the first and second ribs be broken and yet not amount to a permanent injury?
A. That could be without any permanent disability. I have never known of a permanent disability resulting from a rib that was fractured.
Q. Have you ever known of a perfect union in case of fractured collar-bone or clavicle?
A. Perfect union?
Q. Yes.
A. So far as solidity is concerned, I have. I never saw one but what would unite perfectly and be as useful after the fracture as before.
Q. What is the usual result of a fracture of a clavicle?
A. Well, do you mean as to the disability?
Q. Yes.
A. Well, there is no disability, as a rule, that follows a fracture of the clavicle except temporarily.
Q. Did you examine the plaintiff's ribs, as well as other portions of the body?
A. Yes, sir.
Q. Found no fractures?
A. I found no fractures.
Q. Did you examine to see if there were any projecting bones in the ribs?
A. I examined the chest very thoroughly, and I found no displacement of the bones and no fracture. I strongly suspected there had been a fracture, because there had been a fracture of the clavicle, which caused me to make a very careful and thorough examination, and I failed to find any displacement or any fracture.

173 Cross-examination.

Questions by REAVIS:

Q. When did you say you came from Missoula to Cle-Elum?
A. I left Missoula on the morning of the 24th day of April.
Q. And got to Cle-Elum when?
A. I got to Cle-Elum on the 26th.
Q. How many patients were there in the same building with the plaintiff?

MITCHELL: We object to that.
The COURT: Objection overruled.

Q. How many patients were there in the same building with the plaintiff O'Brien?

A. One other patient in the same building at the time he was there.

Q. Who was he?

A. Arthur Hyde.

Q. How many other patients from the collision at the same time did you examine?

A. At that day?

Q. The same time while you were in Cle-Elum?

A. I examined none except him and Arthur Hyde in that building.

Q. I mean in that town.

A. I only examined three at that place.

Q. At Cle-Elum?

A. Yes, sir.

Q. Where were your other patients up there then?

A. There were some other patients at Ellensburg.

Q. Now, what physicians had been treating the plaintiff?

A. Well, Dr. Beebe had charge of the case when I came—Drs. Beebe and Newlin.

Q. Some four or five days had elapsed when you got there since the injuries.

A. He was injured on the 21st.

174 Q. You got there on the 26th

A. Yes, sir.

Q. Did you make any examination on the 26th, the next day?

A. The 26th.

Q. What time did you get there on the 26th?

A. In the morning, about 10 o'clock.

Q. You examined them the same day?

A. Yes, sir.

Q. Who was present when you examined them?

A. Dr. Beebe.

Q. Any one else?

A. I think, probably, Mr. Reed and Mrs. Reed were in the *toom* at the time.

Q. Did you make any remarks about the results of your examination at the time in the presence of these people?

A. Well, I probably stated the condition of the patient.

Q. Was he very sore?

A. Yes.

Q. Now, do you think a patient can be examined a few days after the injury of that character as he can immediately at the time?

A. I think so.

Q. You do not think the soreness and swelling precludes the examination?

A. No, sir; I found no swelling to interfere with the examination.

Q. Now, where were these contusions of the body, Doctor?

A. They were on the back of his neck and chest.

Q. What was the character of them?

A. Well, they were bruises.

Q. Look like they had been made on a rock or some hard substance?

A. They were not discolored, especially on the back of the neck. I think there was a little discoloration on the posterior part of his chest.

175 Q. What made you conclude that there must be an internal fracture?

A. I did not conclude that there was an internal fracture.

Q. You said that you examined him closely.

A. I suspected one.

Q. What made you suspect one?

A. Because he had a fracture of the clavicle.

Q. Now, on what part of the chest were these contusions located?

A. On the posterior part, just below the scapula.

Q. What size?

A. I think he was bruised on both sides.

Q. What size?

A. He felt general soreness all over his chest.

Q. These particular bruises, you say?

A. They were not to be described in size.

Q. Describe them as you can.

A. He complained of soreness over a greater part of his chest.

Q. I *I* asked for a description of what you saw with reference to these contusions on his body. Describe them as near as you can.

A. My recollection is it was not a contusion that presented any appearance.

Q. State what appearances it did present, if you can.

A. To the best of my recollection, I don't think there was any discoloration of the skin.

Q. Well, was there any swelling?

A. No; not to be discovered.

Q. Then how did you discover the contusion?

A. On account of the soreness I presumed it to be a contusion.

Q. As I understand you, you did not see a contusion, but only judged it from its being sore?

A. Yes; I judge he had received a contusion.

176 Q. Now, did you, or did you not, see any contusions on his chest?

A. Not that I remember of.

Q. Well, you stated in your direct examination that there were contusions on his chest.

A. Yes, there was contusions; must have been on account of the general soreness of the muscles, and there possibly might have been slight discolorations of the skin; I think possible there was, to the best of my recollection; the left side was the worst, and below the scapula.

Q. There was discoloration there? What was the appearance of these contusions on the back of the neck?

A. Nothing more than a general soreness of the neck; no discoloration in connection with the injury to the back of the neck.

Q. Was it intensely sore?
A. Yes.
Q. He was generally sore, was he?
A. Yes.
Q. It gave him a great deal of pain to make an examination of him?
A. He complained a good deal in making the examination.
Q. Your judgment is that he suffered a good deal of pain?
A. He suffered pain on motion.
Q. Now, how long a time did you spend in that examination?
A. Well, now, I think I must have been most an hour from the time I first saw him until I left.
Q. Did you observe him spitting blood?
A. No, sir; I did not.
Q. Did you know that he was spitting blood there?
A. Not that I remember.
Q. Did you make any inquiries of the persons in attendance about his condition; make any inquiries as to what his situation had been?
A. Yes, sir.
177 Q. You did not learn that he was during that time spitting blood?
A. I don't remember of that being mentioned.
Q. That would be a fact that *that* you would be likely to remember?
A. Yes, sir.
Q. It would be something of an important feature of treatment, the character of the injuries?
A. Yes, sir; it would be a matter for consideration.
Q. Now, you say, Doctor, that the clavicle most frequently unites perfectly?
A. It is usually a perfect union of the clavicle.
Q. Now, is it not frequently the case that it is not united perfectly?
A. I have never met with one but what it would unite.
Q. Have you ever read that the clavicle often does not unite?
A. No; I never read it did not often. I read that sometimes it did not.
Q. You never saw one?
A. I never saw one but what united.
Q. Is there a shortening of the shoulder there when the clavicle unites?
A. Not always.
Q. Is there generally?
A. I don't think so; not generally shortening.
Q. Does it generally follow when there is an imperfect union?
A. When there is an imperfect union it follows generally.
Q. When there is a perfect union it does not?
A. No, sir.
Q. It resumes its normal position when there is a perfect union?
A. Yes, sir,

Q. The shoulder does? Of course, at the time and for some time afterwards it may appear smaller than the other on account of the muscles becoming atrophied?

178 Q. How long a time, Doctor, would the clavicle ordinarily be in forming a perfect union?

A. Well, a person of his age, I think about eight weeks would be the longest time—six to eight weeks.

Q. To form such a union?

A. Yes, before he would thoroughly recover from the injury.

Q. Now, Doctor, if you were told that five months after the clavicle was broken that it was over an inch shorter and drooped and fell down, and was paintul continually, and the patient could not raise his hand above his head—say, above his chin—what would be your opinion of the character of the injury?

A. Well, if I saw a patient five months after the injury with a drooping shoulder and unable to raise his hand, I should think that he had not used it.

Q. What would you think of the condition of the injury?

A. As to its changing?

Q. Yes, sir.

A. Well, I think the use of the arm might improve it materially.

Q. It would improve; bnt what would you think of the present condition, as to its being union?

A. No; if it was an inch shorter it might be a perfect union, but still there might be shortening.

Q. Then, the facts that I have stated to you, on these facts your opinion would be what worth to the person of the clavicle?

A. I don't understand you.

Q. Well, as to its having united perfectly or imperfectly?

A. Well, I think it might unite.

Q. Well, you think it might unite?

A. Yes, and be shortened.

Q. Do you think it would after five months have elapsed and this condition of affairs and circumstances existing, what do

179 you think with reference to its having united perfectly or imperfectly?

A. I think it must have united by that time.

Q. Perfectly?

A. Well, the union might be perfect and yet there be shortening.

Q. Then, if I understand you, a perfect union of the clavicle, as you mean it, would be where it is a complete union, strong?

A. I mean by a perfect union that the bone is as good and strong as before the fracture.

Q. Then you mean to say that a person who can raise his arm as high as his chin and not beyond his chin, and whose shoulder droop- and the bone is shorter than the other, has as good an arm as he had before?

A. I did not say so.

Q. That is what I understood your answer to be. You said it

was a perfect union and perfectly strong. Now what did you do in the treatment of the plaintiff?

A. At that time?

Q. Yes, sir.

A. I advised Dr. Beebe to have him lay flat on his back.

Q. Did you use any appliances of any kind?

A. I did not at that time; it was not necessary. The clavicle was adjusted perfectly when flat on his back.

Q. Was he sewed up in a sheet at the time you were there?

A. I don't remember of it.

Q. You did not notice that at any time?

A. I think the sheet was used in turning him.

Q. Bound around him?

A. Well, he had a bandage around his elbow, supporting it.

Q. Now, when did you see him in Missoula?

A. I have not the date, but it is my recollection that it was
180 the latter part of May.

Q. Did you see him there before the 5th or 6th of June?

A. I am not quite sure as to that date. I did not keep any record of that time. I did not see him professionally; simply met him on the street and spoke to him of his injuries.

Q. What is your occupation at Missoula, Doctor?

A. It is that of a physician.

Q. Are you employed by the railroad company to take care of their patients?

A. Not now.

Q. Were you?

A. I was at that time.

Q. Were you brought out here by them to Cle-Elum to attend to these patients?

A. Yes; I was sent here by the railroad company to look after the patients.

Q. You are brought there by the railroad company?

MITCHELL: We object to that.

The COURT: That is shown by their putting him on the stand.

Q. At whose instance did you come; did you come to attend this trial?

A. I came for the railroad.

Q. They pay your expenses here?

MITCHELL: We object to that.

The COURT: I think he has a right to show whether this witness is testifying under any interest.

Q. They bear your expenses here and back?

A. Well, I have no understanding with the railroad company whatever about my expenses.

Q. How did you get there?

A. They gave me transportation.

Q. They gave you a free pass?

181 A. Yes, sir.

Q. Did you get one to go back on?
A. I have.
Q. That came from them?
A. The balance of my expenses I have borne myself.
Q. How long had you been in their employ prior to the 21st of last April?
A. I was employed by the railroad company from the first of January, 1886.
Q. You frequently testify in cases of this kind for the railroad company?
A. This is the first case I have testified for the railroad company since I have been in their employ.

Redirect examination.

(MITCHELL:)

Q. You were employed at the hospital?
A. At that time, yes; I was local surgeon at the hospital at the time, but in the absence of Dr. Horton. He engaged me to attend the hospital for him. It was a private matter between us.
Q. You say there may be a perfect union of the clavicle, of a fractured clavicle, and yet be shortening?
A. Yes, sir.
Q. Is there not usually a shortening of the clavicle in a union?
A. There may be shortening and a perfect union, but I don't think it is a rule that there is shortening.
Q. It does occur frequently?
A. Well, it does frequently occur, but not as a rule. I don't think.
Q. Does the mere shortening of the clavicle necessarily produce disability or any injury resulting from it?
A. No, sir; it is not necessary that any disability should
182 arise from it.
REAVIS: They may arise from it?
A. I have never seen a fractured clavicle where there was a perfect union but what they had perfect use.
Q. Where there was this shortening there might arise disability?
A. I cannot think, from the fractured clavicle, there would be any.
Q. That is impossible, you think?
A. That would be temporarily possibly.

Dr. MORRISON, a witness called for the defendant, sworn and testified as follows:

By MITCHELL:

Q. Where do you reside, Mr. Morrison?
A. I claim my residence at North Yakima.
Q. What is your profession?
A. A physician and surgeon.
Q. How long have you practiced that and been engaged in it?
A. A little over ten years.

Q. State if you know the plaintiff in this case, Mr. O'Brien.

A. Yes; I know him to be Mr. O'Brien, who was injured at Cle-Elum.

Q. State wh-ther you made any examination in any way at or about the time of the accident or shortly thereafter.

A. I did examine him once, with all the other patients at Cle-Elum who were injured.

Q. How often did you examine him?

A. I made two examinations of him.

Q. State from the examinations you made of him and his condition what were the injuries.

A. The first examination I made of him was as I was
183 passing around among the wounded to see who needed the first or most attention, and I found him with some scalp wounds, and he complained of some soreness about the shoulders and chest; and then we passed on and examined the other ones, in order to enable me to divide the physicians properly among the wounded.

Q. Well, when did you make another examination?

A. After they had all been once attended to and after Drs. Newland and Bean had examined his scalp wounds and had given him an examination of the chest and arms, having him undressed and in bed at the time. Dr. Harris came to me a short time after and said the man was suffering a good deal of pain; he thought there was a slight fracture of the clavicle. I spoke to Dr-. Newland and Bean about it, and they had not detected any, and I had not in my first examination. I went back with Dr. Harris and examined him very carefully, as he was suffering a good deal of pain, to see the full extent of his injuries, and discover- a fracture of the clavicle, and incomplete fracture of the clavicle. There was no overwrapping of the fragments, nor great amount of displacements, and it was a difficult fracture to detect. I noticed at the time some slight abrasions on the left breast below the nipple; those were the only marks upon him other than his scalp wounds; they were dressed at the time of my second examination, and I didn't pay very much attention to them. At the time of my first examination I examined his scalp wound-, ascertaining that there was no fracture of the skull before they were dressed.

Q. Any fractures of the skull?

A. No fracture of the skull.

Q. Did you notice any bruises on the forehead?

A. Yes; there were some slight bruises on the forehead, some abrasions of the skin—only a little cut on the forehead; but
184 there were so many other injuries of so much greater character that we passed over the smaller ones.

Q. Did you make a complete examination of Mr. O'Brien—all parts of his body?

A. All that was exposed about his waist, chest, and arms and back I examined carefully.

Q. What did you notice as to the ribs, now?

A. I discovered no ribs broken at all.

Q. Did you make an examination?

A. Yes, sir; I examined very carefully his chest, and also his back.

Q. What did you observe about his chest other — these conditions you speak of?

A. Nothing more than just abrasions of the skin.

Q. What would you say of the examination that you made as to the permanency of his injuries?

A. At the time I examined him I could not tell anything about the permanency of his injuries, because in the first few days you can tell but little. A man don't recover from the shock for some little time after he was injured. I can say nothing about that.

Q. What would you say as to the characters of these injuries resulting in any disability?

A. From the injuries that were visible at the time, external injuries, there was nothing that would produce any permanent disability.

Q. Did he complain of any trouble with his rib?

A. Not especially; no, sir. He complained of his left chest particularly and of his shoulder, and he complained very much about the manipulation of his shoulder and his arm while they were examining for the fracture of the clavicle. I remember that fact distinctly, because I was attending to a patient adjoining him, and he caused me to think seriously of his case and have re-examination.

185 Q. Does it often occur that there is a shortening of the clavicle in a union?

A. Not unless there is an overlapping of the fragment.

Q. There was no overlapping of the fragments?

A. No overlapping at the time I examined him.

Cross-examination.

Question- by REAVIS:

Q. How late did you see him, Doctor?

A. I could not state that positively. I left home, I think, about half past one or two o'clock and came down on the train as quickly as they could get me to Cle-Elum. I was taken there and I examined the men in the depot. There was four patients in the depot and I examined them first, and then went directly to Reed's and examined the three cases in the Reed house.

Q. How many were there altogether you examined there?

A. There were nine altogether.

Q. How long did you remain at Cle-Elum?

A. I remained there until 12 o'clock that night.

Q. Did you return again?

A. No, sir.

Q. Have you examined the plaintiff since?

A. Never seen him until I saw him in the court today.

Q. Were you informed at that time that he was spitting blood?

A. No, sir; I was not.

Q. When did you return to Yakima?
A. From my visit east?
A. Yes.
A. Returned this morning at four o'clock.
186 Q. Where from?
A. Tunnel hospital.
Q. When did you get to Tunnel hospital?
A. Last Friday evening.
Q. Where did you come to from Tunnel hospital, from the east?
A. I came directly over the Canadian Pacific.
Q. You have the Tunnel hospital?
A. I have.
Q. How long have you had that?
A. Since a year ago last June.

Dr. J. G. HILL, a witness called on part of the defendant, after being duly sworn, testified as follows:

Q. What is your profession?
A. Physician and surgeon.
Q. You reside here in this city?
A. Yes.
Q. How long have you practiced medicine?
A. Since 1877.
Q. You may state, Doctor, what would be the result and effect of a broken rib.
A. You mean the immediate result?
Q. Well, as to amounting to any permanent injury, a broken rib.
A. It would not be permanent.
Q. Suppose there is a part of a bone projecting internally, is it necessarily a permanent injury?
A. No, sir.
Q. May there be a projection of that bone against the lung
187 and yet not be a permanent injury?
A. It would not be permanent; it would either be absorbed or become encysted. A spicula of bone would be absorbed.
Q. Suppose that a person has scalp wounds of the head—one an inch and another about two inches, one on the left part of the frontal bone and the other on the right perietal bone—state what character of pain would result from such wounds being mere cuts in the head.
A. It would be very acute in the start if the wound was not severe as to cause insensibility; it would be the same as any other wound would.
Q. You may state, if you please, what is the usual method of union of a broken clavicle.
A. Well, it is a bony union.
Q. Well, the result; is it usually shortening?
A. It is usually shortened.
Q. And yet there may be a perfect union otherwise?
A. Yes, sir.

Q. Is it usual to find a case that the uniting of a broken clavicle causes disability?

A. I don't understand.

Q. Is it usual to find that the united bone of the clavicle result in disability?

A. Very unusual if it is properly set.

Q. And yet there may be shortening?

A. There is usually shortening. I don't believe I ever saw one but what there was shortening.

Q. You may state in case of personal injury about the head, as I have described the broken clavicle bone, and even say broken ribs, what would be the character of the pain that he would suffer in the different positions—say, while sitting, lying down, walking—

188 and whether he would — affected by walking around, moving fast, or sitting still.

A. I don't know that I understand you; do you mean at the time of the injury?

Q. Well, he is suffering from an injury now—in walking around, sitting down, lying down. In what particular would the pain he suffered — in the different positions?

A. The different injuries.

Q. Take them either single or altogether; say from the cuts in the head.

A. It is owing considerably to the condition of the wounds of the head, if there was no fracture of the skull.

Q. Well, suppose there was a fracture of the skull?

A. If there is any depression of the bone, the chances are he would be dizzy, and it would be impossible to walk. The chances are he would be in a comatose condition from depression of the bone.

Q. Would that make any difference whether he walked fast or or slow?

A. If there was fracture of the skull or any depression of the bone, I don't think he would walk at all.

Q. You think that a person so situated—so injured—as feeling blood rushing back and forth in his head, do you think he could walk at all?

A. Do you mean if he had a fractured skull?

Q. Yes.

A. He might have a fractured skull and still be able to walk all right.

Q. I mean realized the flow of blood; the feeling of blood rushing back and forth in his head?

A. That might come from different causes; may not be

189 due to the injuries of the skull.

Q. What would cause it?

A. Congestion of the brain, or may be due to anæmia.

Q. Would it likely result from fracture of the skull?

A. It might; yes; I think it would.

Q. Would you consider that that was the nature of the injury from the blood rushing back and forth?

A. No, sir; not necessarily.

Cross-examination.

(REAVIS:) Where there has been a perfect union of the clavicle, what is the average shortening?

A. From a quarter of an inch to an inch.

Q. Are there instances where the clavicle unites imperfectly?

A. There are instances where the bone refuses to unite entirely, but I never knew of a clavicle.

Q. But there might be?

—. ——.

Q. If a person was thrown violently from a railroad train fifteen feet and light on a lot of rocks, his head was cut and bruised and his neck was injured so that he could not move his head perceptibly for a number of days, and contusions and cuts on the head, picked up in a state of insensibility, what would be the character of the pain that he would suffer for a while after he recovered sensibility?

A. It would be owing to what caused his insensibility.

Q. Well, probably I might put it——

A. I could not tell you unless I examined the case and knew what was——

(Question read to witness.)

A. He would be sore all over and have more or less pains
199 all over him; all of his wounds, of course, would hurt him.

(MITCHELL:)

Q. It would be a mere general soreness.

A. Yes, sir.

(MITCHELL:) We rest.

Plaintiff offered the following rebuttal:

Mr. CRAWFOR, a witness called for plaintiff, after being duly sworn, testified as follows:

(REAVIS:)

Q. You were one of the laborers on this train on the 21st of April last, were you?

A. Yes, sir.

Q. You may state what were the directions given by the foreman with reference to riding on the train—on the car.

A. As I understood the thing, we were to ride on the gravel train—on the flats, on top of the gravel.

Q. Did they ever direct them not to come in the caboose?

A. It was — generally understood thing, sir, that they were not allowed to ride in the caboose except——

The COURT: I have heard nothing on the other side that was contrary to the orders of the company to ride on the flat car.

DAVID O'BRIEN, plaintiff, recalled.

(REAVIS:)

Q. You may state whether or not trains carrying passengers for hire ran from Cle-Elum west at any time before this accident.

MITCHELL: We object. We do not think it is material.

The COURT: Mr. Huson said they always carried passengers for hire. Do you wish to show they ran trains exclusively for passengers or that they took passengers on their mixed trains? I don't think Mr. Huson made any denial of that.

MITCHELL: We don't deny that. It is conceded.

REAVIS: We rest.

191 OCTOBER 19TH.

Court met, pursuant to adjour-ment, at 9 o'clock a. m.

(Upon application of defendant and by consent of the court and plaintiff's counsel the following testimony was introduced:)

Dr. BEEBE, witness for the defendant, called and sworn.

Questions by MITCHELL:

Q. Where do you reside?

A. Ellensburg.

Q. That is in Kittitass county?

A. Yes, sir.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been engaged in—practice of a physician?

A. Since the first of April, 1882.

Q. Do you know the plaintiff in this case, Mr. David O'Brien?

A. Yes, sir.

Q. How long have you known him and where did you first see him?

A. I first saw him at the Reed house, at Cle-Elum, on the evening of April 21st, this year.

Q. Did you examine him professionally at that time?

A. I did, casually, but I did not give him a careful examination on the 21st, but on the 22nd.

Q. State when you examined him after that and how frequently.

A. I saw him on the day of the 21st and every day thereafter, I think, until the 27th, when I visited him every day. I think it was the 27th.

Q. The 27th?

A. I think it was the 27th, if I am not mistaken, though I have no record of that; but I visited him every day for a number of days. The last day, I think, was with Dr. Mills. I think

192 that was the date I visited him.

Q. How often did you attend him after that?

A. Well, I attended him from that every second day, perhaps, for an entire week or so, and after that I think he was placed in the hands of Dr. Wheelock, of Cle-Elum, and I visited him when I visited other patients at that place that were suffering from injuries that they had received.

Q. Every second or third day?

A. About that, I should judge; every two or three days.

Q. Well, for how long did that continue?

A. I continued to make regular visits to Cle-Elum to see these patients until the middle of May, when I was attending another patient, in the adjoining room, Arthur Hyde, that had a broken leg. I applied plaster Paris splint to it, and I saw him every time I saw Arthur Hyde.

Q. Well, about how long were you in attendance upon them, taking it altogether?

A. I think about four weeks after the time.

Q. Now, you may state what you know of his injuries. State what they consisted of and what they were.

A. Well, his injuries were a fracture of the clavicle, or what is known as the collar-bone, and he had a scalp wound, and also there was a considerable degree of muscular soreness.

Q. What was the nature of his clavicle wound?

A. Well, it was a fracture—a complete fracture—of the clavicle near the division of the outer and middle third, as near as I can give it.

Q. What were the wounds on the head?

A. The wounds on the head consisted of simple scalp or flesh wounds.

Q. What other wounds did you notice about the body other
193 than those you mention?.

A. I noticed no other wounds, except perhaps some slight bruises.

Q. Did you make an examination of the portion in and about the rib?

A. Yes, sir; I examined his body very thoroughly on several occasions.

Q. Did you find any broken ribs?

A. No, sir.

Q. Were there any broken ribs?

A. I didn't discover any. It is my judgment that there were none.

Q. Did you find any indications of brok-n bones other than those you mention?

A. No, sir.

Q. In the region of the ribs?

A. No, sir.

Q. How was the union of this collar-bone at the time that he left your treatment?

A. There was a good union, or as good as we expect. There was some little deformity, which, as a rule, will exist—some little deformity on acc't of the patient not being able to be placed in a perfect position—but the union was good.

Q. Considering the union of that clavicle bone, the fracture of that clavicle bone at the time that Mr. O'Brien left your treatment, and the condition it was in at that time, what would you say as to its interference with the use of the arm in any way?

A. It would not permanently affect him. By having to hold the shoulder still for a length of time will always impair the use of a limb for a certain time, but that is not permanent.

Q. That is not for any great length of time?

A. No, sir.

Q. Now, what is the effect of the non-use of the arm?

A. Well, the effect of the arm is that it will become anchalosed; it stiffens and the use is impaired.

194 Q. If it is used a little from day to day that will pass away, will it not?

A. Yes, sir.

Q. What is the appearance of the deformity ordinarily in clavicle fractures?

A. Well, where the bones—fracture of the clavicel are in a great majority of instances—are broken obliquely across, so that there is a lapping of the bones when they come together, there is a calos thrown out from the bone; but not being able to hold it an an exact position during the treatment, there would always be left, — in passing the finger over so that you will always feel the ridge in the clavicle.

Q. Will that pass away in time?

A. No, sir; there is always left some deformity in its place in the collar-bone.

Q. Does that cause any disability in the use?

A. No, sir; none whatever.

Q. Is there any fracture of the skull?

A. No, sir.

Q. Did you see any wound on the forehead?

A. Well, nothing more than there might have been an abrasion, but there was no flesh wound to any extent; it was an abrasion of the skin.

Cross-examination.

Questions by REAVIS:

Q. When did you go to Cle-Elum, Dr.?

A. I went on the evening of the accident—the 21st of April.

Q. Who called you there?

A. I was called there by a telegram from the assistant engineer.

195 Q. Of the R. R. Co.?

A. Yes, sir.

Q. You were treating cases for them, were you?

A. Yes, sir.

Q. Now, how many patients did you see at Cle-Elum?

A. Well, I saw what were injured there at that time.

Q. Well, about how many?

A. Well, Judge, there were ten or twelve of them.

Q. Can you state accurately the number of patients, Doctor, you examined there?

A. No, sir; I cannot; I cannot give them within one or two, because the name I've forgotten.

Q. Can you give the numbers?

A. I can come within one or two of the numbers, but there were some there that were injured so slightly that they were walking around the same evening.

Q. Those that were slightly injured you did not pay much attention to?

A. I cannot give you the number that were injured so that they required immediate treatment.

Q. How many doctors were there?

A. At that evening?

Q. Yes.

A. There were six including myself.

Q. Who were they?

A. Dr. Morrison, of the Tunnel; Dr. Harris, of the coal company's office; Dr. Beam, Dr. Newland, Dr. Wheelock, and myself.

Q. Where does Dr. Beam live; who is he?

A. Dr. Beam at that time was a resident of Ellensburg.

Q. Where is he now?

196 A. At the present time he is at Tunnel City, in the employ of Dr. Morrison. He took charge in Dr. Morrison's absence.

Q. His business was for Bennett, the contractor?

A. Yes, sir.

Q. You stated that you only casually examined him on the 21st.

A. Yes; I casually examined him, as his wounds were dressed when I went there.

Q. Who had dressed them?

A. That I cannot tell you.

Q. Then you saw him again on the 22nd?

A. Yes, sir.

Q. Who was with you then?

A. Dr. Wheelock.

Q. Dr. Wheelock treated him—that is, waited on him for some time?

A. Dr. Wheelock waited on him for the first few days; perhaps up to about the 27th he waited on him.

Q. Wheelock treated him after that?

A. He prescribed for him in my absence.

Q. Do you know Mrs. Reed?

A. Yes, sir.

Q. Was she around there?

A. Yes, quite frequently.

Q. Taking care of the plaintiff, O'Brien?

A. Well, I don't know that she was regularly installed as nurse, but being the landlady she took an interest.

Q. Did you see her there when you were about O'Brien?

A. Yes, I saw her.

Q. Do you know Mr. Bowman?

A. I don't recall the name now.

Q. Who were his nurses?

197 A. Well, the man that took care of him was a young man by the name of Smith.

Q. Was there any one else about there?

A. Yes, there was another young man. I don't know that I ever learnt his name. I think I would know him if I saw him. I think he was one of those that were in the wreck, that was perhaps uninjured or perhaps so much so that he remained and took charge of him.

Q. Did you sew up these scalp wounds, Doctor?

A. No, sir.

Q. Who did?

A. I could not tell you that. There was great confusion there that evening.

Q. How many doctors were there at work that evening you say there was great confusion?

A. There was five there before me. I was the last one to get there. I was in the country when they sent down, and Dr. Newland and Dr. Beam went up.

Q. He also had a cut across the forehead that was sewed up?

A. I think not. I think the scalp wound extended down on the side.

Q. Don't you think there was a cut here (indicating right side of forehead)?

A. I think not. I think it was on the side of the parietal bone.

Q. Where would that be?

A. That is on the front here (indicating).

Q. The lowest one that was cut?

A. There on the side of his head. It seems to me it was on the left parietal bone.

Q. Up in there or below there?

A. The greater portion of it was in the hair. It lay, perhaps, on the forehead; the point extended down.

198 Q. Did you have any conversation with Mrs. Reed about his condition, or did you mention anything in her presence about his condition?

A. I presume it was generally talked of. I don't remember to have said anything directly to her, but perhaps what I said was in her presence.

Q. Do you remember saying to her that he was about the worst hurt man in the house?

MITCHELL: We object to that. The statement of the physician cannot bind us.

The COURT: I think it is proper cross-examination.

A. I don't remember of saying that. I don't remember of using those words, although at that time there were patients in the house that were moved that day. I cannot say at the present time that he was suffering more than any man in the house.

Q. That would be at what time?

A. That would be the time before there was a man by the name of Grace moved into the house.

Q. I mean about what time after the accident was this intense suffering existing with him?

A. He was making more complaint right at that time than when I first saw him.

Q. His complaints at that time were very considerable, were they?

A. Well, he complained of being in a great deal of pain.

Q. Intense?

A. Yes; he said he was suffering a great deal.

Q. You thought he was suffering?

A. I don't doubt that he was suffering. I think he was.

Q. Now, how long did you continue to see him?

A. Well, I think I saw him every few days up to the 27th day of April.

Q. Do you know what time he went to Missoula?

A. No, sir.

199 Q. Do you know how long he was at the Reed house before he was removed to Missoula?

A. No, sir; I could not give the exact date at all. He was at the Reed house a considerable length of time after he was up and walking around.

Q. Do you know why he was removed to Missoula?

A. Yes; I presume I could give the reasons.

Q. What was he removed to Missoula for?

A. Because he was a company patient. Their hospital is there, and he was removed there not for treatment, but to give him quiet till he could go to work.

Q. He was removed to Missoula about a month after the injury?

A. I judge it was about a month.

Q. Now, Doctor, are there not instances of a fracture of the clavicle or broken clavicle by the formation of a chalas mentioned by you, that continue enlarging and pressing on the nerves and blood vessels, so that there is a partial and sometimes a complete paralysis of the arm?

A. I don't call to mind anything of the kind. I never seen anything of the kind.

Q. Are there any instances in the medical books?

A. I cannot state that there was.

Q. Is there anything, in your judgment, to make such a conclusion possible?

A. I cannot say why it should be; I cannot say why such a thing should be, why a broken — that way should continue to cause anything of the kind.

Q. Have you ever seen or known of the paralysis of the muscles from an injury of that kind?

A. No, sir; I never have.

200 Q. Now, the ordinary rule — that the injury to the clavicle is complet-ly cured in a person of his age?

A. Yes—that is, if there was anything contrary there would be; that would be where a non-union took place, and would be a case where the bone had not united with the same readiness that they do in younger persons. Where the union is complete it is just as good; there will be no more ous result.

Q. Suppose the union was not complete—vicious union—what would be the result?

A. What do I understand you to mean by vicious union?

Q. Do you not understand the term vicious union?

A. No, sir; not used in that way. We have non-union and carte-legi-ous unions.

Q. Well, do you know what the term vicious union, as applied by the physicians to such a fracture, means?

A. Well, I din't call the term to mind. If you mean that it was a union that would lead to future trouble, it would be a cartelegi--ous union.

Q. Now, if that had occurred, Doctor, in a broken or fractured clavicle, what would be the result?

A. Well, he would loose partially the strength of the shoulder. The bones would be working back and forth, and, perhaps, would get up a great deal of inflammation. He would not be able to pass his hand up to his head.

Q. He would not be able to raise his hand in what direction?

A. He might be able, by the muscles, to raise his hands; yet, if there was no union, when he undertook to work his shoulders the bones would have play and irritate the shoulders.

Q. That is what you call cartelegi-ous union?

A. No; that is non-union. Cartelegi-ous union is a chalos
201 formed in the bone.

Q. Now, if that state had existed for five months, what is the probability of recovery?

A. If it existed for five months, perhaps it would continue to exist.

Q. Permanently?

A. Yes, sir.

Q. Did you observe contusions on the body?

A. No, sir; I don't remember.

Q. Didn't have your attention called to this?

A. Well, I examined the man carefully, but I don't remember noticing contusions.

Q. Did Dr. Mills during the time that you were with him notice the contusions on the body?

A. I don't remember that he noticed them. There might have been some small ecca-mosed places on the body, but I don't ever remember having noticed them.

Q. Did he complain of his left side?

A. Yes, sir; he complained of both sides—complained of hurting him. He complained of his left side more than his right.

Q. Was he spitting blood, Doctor?

A. No, sir; he never spit any blood that I know of.

Q. You didn't know that he was spitting blood?

A. He never spit any blood, to my knowledge. If he did it was in my absence and my attention was never called to it.

Q. How long were you with — when you went to see him?

A. Well, I would be with him about, probably, fifteen minutes to

an hour. I would be in the room occasionally adjoining—back and forth.

Q. How much attention did you give to him *to him* at any one time?

A. I could not state the number of minutes. I gave all
202 the attention I thought was necessary.

Q. How many patients would be there when you went to see him?

A. After the first two or three days, there was but the two patients.

Q. Now, what were these five or six doctors all doing there on the 22nd?

A. Five or six doctors were not there on the 22nd. They were there on the 21st.

Q. What did they all do?

A. They were called there, as all the doctors were that could be got.

Q. Did they all go to work attending them?

A. Yes, sir.

Q. All made examinations?

A. Yes; I presume they were, so far as I know; I was not there till the wounds were all dressed.

Q. You don't know who dressed the particular wounds of these patients?

A. No, sir; I could not state.

Q. Have you ever examined the plaintiff since, Doctor?

A. I have not examined him since he went to Missoula.

Q. Doctor, if a person was thrown violently from a railway train some 15 feet, lighting on rocks, and was found with two cuts on the head and a slight elevation of the bone, indicating that there had been a slight fracture of the bone—the right clavicle fracture-, two of the ribs of the left side fractured—and *should* an examination five months afterwards the clavicle was found to have made a non-union or vicious union, and a person unable to raise his arm except to a position below the chin, and there was a dullness or precussion on the left side, and a flattened condition of the chest, and the resonance of the lung very much impaired, and continual
203 pain was suffered in the left side, with a dizziness and a blood rushing to the head after exertion, would these injuries probably continue?

A. I don't think they would continue very long.

Q. You are basing your opinion on what?

A. I am basing my opinion on that I don't think a man as last described—I think the undertaker would be the one to see. I understand the question perfectly; you ask if I think that this would continue long; if the man was in that condition, I think he would not live.

Q. Why would he not live?

A. In the first place, if a man were in that condition and there were dullness on percussion, and there was continual pain in the left side, and all these things you mention, I would say that that

condition of the lung would cause his dissolution; it would indicate lesion of the lung, provided such a state of facts existed.

Q. Now, Doctor, if a specula of the bone from the fractured rib should enter the left lung, what would be the result?

A. There would be an inflammation follow, as a matter of course. Any foreign body entering the lung would set up such an irritation there it would cause inflammation of the pleaura, because it would extend through the pleaura sack before entering the lung; there would be inflammation of the lung and pleaura, and there would be such a serious difficulty that it would be diagnosed by almost any casual observer. There would be an exudition follow.

Q. What would be the probable result of such a condition?

A. Death.

Q. What are the indications of pleaura pains?

A. In the first place, there is a very severe pain, followed by fever, exhilaration of the pulse, and the next we observe, on close examination, is a dry surface, the rubbing together of the pleaura surface, one lining of the ribs and the other the lung; that
204 could be readily detected.

Q. How would it be detected by the physician examining?

A. By placing there stethescope or ear to the lung, by the sound that would be emitted at that time. There would be the product or products of inflammation; there would be an outpouring of watery fluid or limp and fill up the pleaura cavity, and this would be followed by labored breathing. In an injury of that kind it would puncture through and escape into the lung tissue, and great prostration and spitting large quantities of blood, and finally of pus, would follow—all the symptoms not only of pneumonia and lung-fever, accompanied by pleurisy.

Q. You would not think it probable that such a condition would be removed by the ordinary course of absorption?

A. No; especially a patient in his condition; I would not think it possible.

Q. Would there be, Doctor, any irregularity in the chest—in the expansion of the chest—under such circumstances?

A. Yes; there would not only be an irregularity that could be plainly observed by the naked eye—that is, after exedition—after the pleaura sack had filled up we would notice it would be enlarged; there would be a great dullness on percussion, because in percussing over the lung tissue being filled so with air cells, we notice that it sounds barrel-like—hollow sound—and percussing over water the sound would be dullness; it would be a flattened, dull sound.

Q. That would be easy detectible to an experienced physician on examination?

A. Yes; it would be detectible to almost any one.

Q. What would be the character of the pain suffered by him under such circumstances?

A. The pain would be mostly at that point, and would be
205 very severe every moment, and every breath taken and expiration would cause severe pains.

Q. There would be an irregularity of expiration and exhalation?

A. Yes, sir; because the patient would attempt an extension of the lungs.

Q. It would not be a regular expiration and inspe-ation?

A. No, sir; it would not be r-ythmetical.

Q. What, Doctor, is the probable effect of a nervous shock on a person falling from a considerable distance as I have named, from a train in motion, and lights on a bed of rocks, and is picked up in a state of insensibility?

A. It is owing to the person. Take some persons, a nervous shock may cause death if there was no sign of violence, while another person, as soon as he opens his eyes, walks off about his business and pays no attention to it.

Q. Nervous shock alone might be sufficient to cause death?

A. Yes, sir.

Q. It does often, does it not?

A. Death has resulted in many instances from shock alone.

Q. There would be no indications, so far as outward appearances are concerned?

A. Death might occur from shock alone, although there was no external evidence of it.

Q. Now, does not that shock some time- leave an injured condition of the nerve? If it produces death, does it not produce bad effects sometimes?

A. Yes; it might lead to a great many.

Q. Mention some of the most serious.

206 A. In a case like Mr. O'Brien's perhaps you could get a good one. In his condition, his system not being in a good condition, because when I first saw the man he had a very heavily coated tongue and he was subject to malarial influence, and from the result of that shock I attribute it, because he suffered for three weeks from malarial fever.

Q. Did the shock produce it?

A. I think it did to some extent. It prostrated him and like most malarial effects.

Q. Go on and mention from the shock some of the possible results without reference to any particular individual.

A. Well, I think from the shock there might be produced in a man predisposed—that is, if he was of a scrofulous diathesis it might be that it would act to excite the cause of that disease. If he was healthy when the shock occur-ed he may have gone on in good health the same as he was, but if he was predisposed or he might get into a paralyzed condition.

Q. Does not paralysis often result from such a shock?

A. I cannot call to mind a special case, but paralysis might result from such a shock.

Q. Paralysis wholly or partially?

A. Well, it would be an exception. I think it might occur. Usually the result- of the shock are thrown off and there is no serious results.

Redirect examination.

(MITCHELL:)

Q. Doctor, may a spicula of bone protrude against the lung without causing any serious result?

A. No, sir; I cannot conceive how it would, any more than you could stick a pin in the flesh and not cause an irritation, because irritation will always follow a punctured wound of any kind, more especially in touching a vital organ.

Q. If such spicula existed in such position so as to cause
207 acute pain, would it not soon cause death?

A. Well, I think so, while it might be possible that it is entirely inside of the lung, if it is very small; it might be possible it would become incased, forming a sack, and if it was entirely detached, but if it was adhering to any other point or anything else, so that the lung was playing backward and forward, such a condition could not exist. It would have to be entirely detached and be as a foreign body. It might form a sack in any part, or even in the brain, and lay dormant for years without any serious results to follow.

Q. Now, did Mr. O'Brien describe to you any of the sensations, such as blood rushing through the head, as has been specified in the questions asked you?

A. Mr. O'Brien—the only suffering Mr. O'Brien complained of was confined to his body and his shoulder, principally to his body, and more especially when he attempted to lie perfectly still and breathe, but when he attempted to change his position any way he complained of great pain.

Q. Didn't he walk around considerably after he got up—out around Cle-Elum?

A. I saw him on a number of occasions when he walked around the house.

Q. What, in your judgment, caused these pains he complained of?

A. I think the pains came from muscular soreness. That was my diagnosis of it at the time, that it came from muscular soreness, the same that came from the inner side. The pain in the region of the clavicle came, as a natural result of the fracture of the bone, from the pressure.

Q. I will ask you, Doctor, if Mr. O'Brien was complaining of any particular pain at the time of your treatment—at the time he left Cle-Elum or when you last saw him at Cle-Elum.

A. No, sir; he did not complain of any pains. He came
208 to Ellensburgh, and I think he staid about two nights with me in Ellensburgh before going to Missoula. His complaint then—while he seemed to be pleased to think that he was recovering, he said he felt very good, but he complained of a stiffness of the shoulders, but on examination I found that he could raise his hand on top of his head, on a number of occasions, and assured him, as he will remember, that, in my judgment, it would be a question of time that his arm would be restored to usefulness. I based my

opinion on the improvement that had been made from the time he was injured to that time.

Q. You saw no evidence of these sensations that have been spoken of in the questions asked by Reavis?

A. I saw no evidence at the time he left me of any of the conditions that was mentioned in that article read.

Q. Did he describe any of the sensations in this hypothetical question?

A. No, sir; he didn't complain while he was at Cle-Elum. When he first got out of bed, when I first saw him, he complained of being dizzy, but that will follow in any case where any one has been in a recumbent condition after resuming the upright, because it brings about a change of the circulation — blood will naturally be taken from the brain.

Questions by REAVIS: I believe you state that he complained while at the Reed house of pain in the side?

A. Yes; he complained of pain, very acute pain, while staying at the Reed house.

Question- by MITCHELL: What would that result from?

A. It might result from a good many things. My judgment — it was the result of muscular soreness from the jar he had received.

Q. You speak of what you know of his condition and treatment?

A. Yes, sir.

209 THOMAS CRAWFORD, a witness for the plaintiff, called and sworn, testified as follows:

Questions by REAVIS: You were employed in this work with Abercrombe'- men, were you?

A. Yes, sir.

Q. You were on the train the 21st of April, 1887, were you?

A. Yes, sir.

Q. Now, I will ask you whether or not you had ever been ordered or heard the men ordered out of the caboose.

A. Yes, sir.

Q. State who ordered you out and what the orders were.

A. Mr. Hewitt, the conductor.

Q. Anybody else?

A. No, sir.

Q. What did he say?

A. Well, we were ordered out three times altogether.

Q. Did he tell you where to ride?

A. He told us to go forward on the flat car. There was one or two of the men who were allowed sometimes to jump on the platform, but not go inside.

Cross-examination.

By MITCHELL:

Q. Mr. Crawford, you have sued the company for damages growing out of that collision?

A. Yes, sir.

Q. How much damages are you claiming?
A. $20,000.

And the testimony of the witnesses having been concluded and the argument of counsel having been made, the court proceeds to charge the jury, and of his own motion gives the following instructions:

210 GENTLEMEN OF THE JURY: The first question in this case is, Was the accident which caused the injuries of the plaintiff the result of negligence on the part of the defendant, its agents or servants? And on this question I charge you that it is your duty to find that said accident was the result of such negligence.

("To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

The mere happening of the collision between the two trains of the defendant, unexplained, under the circumstances which the undi-puted facts of this case show, raises a presumption of negligence which, in the absence of evidence tending to show that the defendant's servants in charge of said trains were without fault, would be sufficient for you to base a finding of negligence on."

(To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

"But not only has the defendant failed to offer any testimony whatever tending to show that its servants were without fault, but the uncontradicted testimony shows affirmatively that they were grossly at fault."

("To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

The train with which Hulett's train collided, and which had orders to flag against Hulett's train, had no business to be where it was at the time of the collision; it should have remained at the point where the flagman was put off and sent forward until he had proceeded a sufficient distance forward to guard against accident, but instead of that the train followed behind the flagman only a few hundred feet and was thereby placed in a position where it was impossible to prevent a collision with the train which came

211 dashing around the curve with its load of human freight ignorant of the impending danger.

("To the giving of the said instruction the defendant then and there excepted, which said exception was duly allowed.)

"This was gross negligence on the part of those in charge of said train, and the facts being undisputed, it is the duty of the court to tell you so and *and* not to confuse you with abstract definitions of negligence, which you may not understand alike and may therefore have difficulty in applying.

("To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

"I do not mention the claim of plaintiff that the Hulett train was running so rapidly at the time of the collision as to make that an act of negligence also, because the rate of speed at which said train was running is in dispute, and the negligence in the manage-

ment of either of the trains is sufficient for the purposes of this case.

("To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

"The negligence in this case was the negligence of the conductor and engineer of the train which was at fault, who, under the rules of the company, promulgated for the government of its road, are made jointly responsible for the movement of their train when in a condition such as that just before the collision.

("To the giving of said instruction defendant then and there excepted, which said exception was duly allowed.)

"While said conductor and engineer were in a sense fellow-servants with the plaintiff in the employment of the defendant, they were in another sense agents of the corporation, clothed with the control and management of a distinct department of the business of the defendant, and are therefore to be treated as the
212 personal representatives of the defendant, for whose negligence it is responsible to subordinate servants.

("To the giving of said instruction defendant then and there excepted, which said exception was duly allowed.)

"This being true, the defense set up by the defendant that the plaintiff was injured through and by the negligence of its fellow-servants fails."

("To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

"Another defense set up by defendant is that of contributory negligence; in other words, that the plaintiff voluntarily put himself in a position of danger which contributed to his injury. If this fact be established, then the plaintiff is not entitled to recover. In order to recover, he must be free from fault. The negligence which the defendant attributes to him is his act in taking his position on the flat car, in front of the engine, instead of going into the caboose, which was behind the engine. If the caboose was provided on the train for his accommodation, along with the others of the gang of workmen, and defendant, of his volition, chose to occupy a place on the flat car and was injured thereby, then this was an act of contributory negligence which will bar his right to recover. But if the caboose was attached to the train for the accommodation of the trainmen alone, the flat car being provided for the gang of track workmen, or if the servants of the company in charge of the train directed the workmen to take positions on the flat car, then they were not guilty of negligence in obeying that direction and riding on said car, and, of course, the plaintiff, being one of said workmen, was not guilty of contributory negligence in that particular."

("To the giving of the said instruction the defendant then
213 and there excepted, which exception was duly allowed.)

"Upon this question of contributory negligence the burden of proof is on the defendant—that is to say, the defendant must establish the fact of contributory negligence by a preponderance of the evidence; and, if said fact be so established, then the defendant is entitled to a verdict at your hands; but if the preponderance is

with the plaintiff, or if the evidence be so evenly balanced on the question that you cannot say that it preponderates in favor of either party, then the plaintiff would be entitled to your verdict.

("To the giving of said instruction the defendant then and there excepted, which said exception was duly allowed.)

You will consider the evidence carefully in this issue and determine on which side it preponderates, and render your verdict accordingly. If your verdict be for the defendant on this issue you need go no further into the case, but should return a verdict at once; but if your verdict be for the plaintiff it will be necessary for you to go one step further and determine what damages he is entitled to recover under the evidence.

On this subject I charge you that the plaintiff is entitled to recover only compensatory damages.

The elements of compensatory damages in cases of this kind are many, but in this case the plaintiff has enumerated two only in his complaint, and you will be confined to them in considering what, if anything, he is to recover. These are the bodily pain which he has suffered and which he claims he will always suffer from his injuries, and compensation for loss of earnings since the injury and for loss of future earnings power. With reference to damages to be awarded for bodily pain which the plaintiff has suffered and which he may yet suffer from his injuries, it is obvious that there can be no fixed rule for the allowance of such damages.

214 The jury must consider the testimony bearing on the subject fairly and impartially and without passion, and award what they deem to be fair and reasonable compensation for such injuries under all the circumstances of the case."

With reference to loss of earnings since the injury up to the time of the bringing of this suit, the plaintiff's right of recovery is capable of accurate ascertainment, the plaintiff having the ability to establish his earning powers and the extent to which he had been prevented from exerting them. If he has made such proof in this case, and you deem him entitled to recover at all, you will award him under this head what the evidence shows him entitled to. With reference to the claim for loss of earning power in the future, you will consider whether plaintiff's injuries are now cured or whether they still exist. If they still exist, whether they are temporary or permanent. If plaintiff is now cured, of course you will allow nothing for loss of future earning power. By cured I mean if he is as good a man as he was before. If his injuries still exist, but you believe them to be temporary, then you ought to arrive at a conclusion as to their probable duration and award him such sum as will compensate him for his loss in that particular. If you believe his injuries to be permanent, you ought to reach a conclusion from the evidence as to the probable duration of the life of the plaintiff and award such sum as will compensate him for the injury caused by his permanent disability, the elements to be considered under this head, in addition to the probable duration of the plaintiff's life, being his earning power when well and free from injury

and the extent to which that power is diminished by reason of the injury."

Under the head of loss of future earning power the plaintiff's losses should be estimated at their present worth—that is, at such a sum as being now paid the plaintiff and put at interest would amount, principal and interest, to the sum total the plaintiff
215 will lose in future by his injuries. The plaintiff cannot in any event recover more than he has claimed in his complaint, which is $10,000.00. He is not to be awarded that sum unless you believe him to be justly entitled to the same, nor is he to be awarded any such sum beyond what you believe him to be justly entitled to under the law and the evidence. Put away from you, gentlemen of the jury, any feeling of bias, prejudice, or passion; forget who the parties to this suit are; determine it as if both were unknown to you and indifferent to you, and render such verdict only as you may feel compelled by your oaths as jurors to render."

That then and there the defendant, by its counsel, after the retirement of the jury and before the verdict had been returned, and within the time allowed by law and the rules of the court, excepted to such of said instructions as are indicated by this bill of exceptions as excepted to.

The instructions not having been numbered or separated into paragraphs, said exceptions were made as nearly as possible to correspond to the portions desired to be excepted to.

That then and there the defendant, by its counsel, asked the court to give the jury the following instructions:

I.

"That the testimony of an expert, given upon and in answer to a hypothetical question, is entitled to weight only when the facts upon which it is based are by the jury considered proven by a preponderance of the evidence, and if not so proven such testimony is to be disregarded. (Given. G. T.")

II.

"That the presence of indications of injury appearing in September or October upon the body of plaintiff, if any such existed,
216 is no evidence that such injury was inflicted or received in the month of April before. (Refused. G. T.")

(Refusal excepted to by defendant).

III.

That the plaintiff was at the time of the collision a fellow-servant and coemployee of the engineers and conductors of the colliding trains, who were engaged in a common employment with him, and that if they find from the evidence that said collision occurred through the negligence of said conductors and engineers, or the negligence of the conductor or engineer of either of said trains, or

the negligence of either the said conductor or engineer of either of said trains, and that the plaintiff was injured thereby, that in that case defendant would not be liable to plaintiff for said injury. (Refused. G. T.)

("Refusal excepted to by defendant.")

IV.

The jury is instructed that they may disregard the opinions of expert witnesses based upon hypothetical statements of facts if the jury should find the hypothesis to be not in accordance with the facts. (Given. G. T.)

V.

The jury is instructed that in order to justify the assessment of damages for future or permanent disability it must appear that continued or permanent disability is reasonably certain to result from the injury complained of. (Given. G. T.)

VI.

The mere fact that any injury may possibly result in permanent disability does not warrant the assessment of damages for
217 a possible disability unless it is also reasonably certain to follow. (Given. G. T.)

VII.

The jury are instructed that the rules to be derived from standard life and annuity tables are not to be taken by the jury as absolute guides of the judgment and conscience of the jury; that they (the jury) are not to be bound by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof. (Given. G. T.)

VIII.

That if the plaintiff voluntarily (the following in quotation interlined by the judge: that is, of his own motion and without direction from his superior) rode upon a dangerous place upon the train of defendant when he could have been riding in a safe place provided for him, he assumed all risks incident to such a place of danger, and any injury which he received while riding in such place was the result of his own negligence, for which he cannot recover. (Given. G. T.)

("Excepted to as modified by interlineation.)

IX.

The plaintiff cannot recover for any negligence other than that alleged in his complaint; that the allegations of plaintiff's complaint are not sufficient to recover any negligence of defendant ex-

cept negligence in the operation of its trains, and that there can be no recovery unless negligence of the defendant in the operation of its trains is proven by a preponderance of the evidence. (Refused. G. T.)

(Refusal excepted to.)

218 That the court gave all of said instructions except numbers two, three, and nine, which were refused; that then and there the defendant, by its counsel, excepted to the refusal to give numbers two, three, and nine of said instructions, and to each and every part of said refusal, and to the giving of number eight of said instructions as modified by interlineation; that the defendant then and there, and within the time allowed by the court, filed its motion for a new trial, and the court, after argument of counsel and upon due consideration thereof, overruled said motion; to which ruling of the court defendant, at the time of said ruling, duly excepted; the said exception was then and there allowed.

And the defendant now assigns as error each and every matter and thing set forth in said motion for a new trial; and now, at the request of defendant's counsel and within the time allowed by the court, this bill of exceptions is settled and allowed; and I, George Turner, judge of the above-entitled court, do hereby certify that the foregoing bill of exceptions, from page one to page ninety, inclusive, contains a statement of the facts and evidence and all of the evidence introduced at the trial and upon which said cause was heard and determined, and that said bill of exceptions contains all the material facts necessary to a determination of any and all questions involved in said cause and the rulings thereon, except such rulings as were entered of record at the time of the occurring thereof.

Settled and signed this 15th day of November, A. D. 1887.

GEORGE TURNER,
District Judge.

Copy of the above and within bill of exceptions received this 31st day of October, 1887, at North Yakima, W. T.

REAVIS, MIRES & GRAVES,
Attorneys for Plaintiff.

219 TERRITORY OF WASHINGTON, } ss:
Fourth Judicial District, }

I, D. A. Clement, clerk of the district court of the fourth judicial district of Washington Territory, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said district court this 31st day of May, 1888.

[SEAL.] D. A. CLEMENT, *Clerk*,
By R. STROBACH, *Deputy.*

220 In the Supreme Court of the United States.

THE NORTHERN PACIFIC R. R. Co.
vs.
DAVID O'BRIEN.
No. 1560.

Error from the supreme court of the State of Washington as successor to the supreme court of the Territory of Washington.

It is mutually stipulated and agreed by the parties to the above-entitled case that the paper annexed hereto, being a petition for a rehearing filed by the plaintiff in error in the supreme court of the Territory of Washington, and which said petition was omitted from the record sent from the supreme court of the State of Washington, shall be inserted in the said record and become a part thereof as though originally sent up with the said record by the court below.

MITCHELL, ASHTON & CHAPMAN,
Att'ys for Northern Pacific R. R. Co.
JOHN PAUL JONES,
Att'y for David O'Brien.

We agree also.

A. H. GARLAND,
H. J. MAY,
For N. P. R. R. Co.

In Sup. Court U. S.
Jan'y 7, '91.

[Endorsed:] No. 1560. Supreme Court of the United States. Northern Pacific R. R. Co., pl'nt'f in error, *vs.* David O'Brien, def't in error. Stipulation to insert accompanying petition as a part of the record. John Paul Jones, att'y for def't in error.

221 In the Supreme Court of Washington Territory.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

Petition for Rehearing.

Leave of court having been granted to plaintiff in error for the filing of a petition for rehearing in this cause, such petition is here and now presented for the consideration of the court, and the following is submitted to the court as the argument on behalf of said petition, to wit:

It is deemed proper, on behalf of plaintiff in error, to state that this cause was (owing to the large amount of business pending before the court at its last January term and the short period of time in which the work of that term had to be done) hurriedly considered, and such a short time was given to its consideration that it was hardly possible to do justice to the cause, involving, as it does, so

many novel and important questions of law. In fact, the time of the court was so limited that counsel, in the presentation of the case, were limited in time to such an extent as to preclude their calling to the attention of the court all of the points involved in the case or all of the objections to be considered, and little opportunity was afforded counsel for enlarging to any extent upon the points or objections actually made; that owing to this lack of time in presentation of the case not more than one-third of the points of argument contained in the brief of either counsel were called to the attention of the court in the course of argument. Naturally enough the court, in passing upon the case in the limited time which they had, only gave special attention to those points which were outlined and referred to by way of oral argument. The decision of
222 the court as rendered is clearly evidence of this fact. The two points—1st, of the effect of the application of section 1 of the code of 1881 of Washington Territory, and 2d, the matter of contributory negligence of plaintiff by reason of being in a place of known danger—both of which points were fully set forth and argued quite at length in the brief of plaintiff in error, were not referred to in any way whatever by the decision of the supreme court. Being at the latter part of the brief, the point with regard to contributory negligence was not reached in the course of the oral argument, because such argument was commenced from the beginning of the brief, and it was only continued so far as the limited time would allow. The other point was reached and argued at some length, but there was not time to even refer to all the points involved in that question. There was, however, enough said in the way of oral argument, and there was enough of force in what was said to have justified and in fact to have authorized the court, in making a decision, to have not only referred to it, but to have fully and definitely passed upon it, with a complete statement of reasons for any decision for or against the position taken by counsel for plaintiff in error respecting it. The learned chief justice who wrote the opinion in this case stated in open court as his reasons for being willing that leave should be granted to plaintiff in error to file a petition for rehearing in this case that so little time had been given for argument of counsel and consideration by the court and so many novel and important questions were involved in the case, requiring more time for both argument and consideration than ordinary cases, that plaintiff in error was really entitled to have leave to make such application and should be given a reasonable time within which to make it. Only three members of the bench sat upon the hearing of the case, only two of whom concurred in the decision which was rendered, the other dissenting. The decision as it stands was therefore rendered by two of the four members composing the
223 court. This petition, however, while made and filed during the time of the territorial government, will undoubtedly be presented to and considered by the supreme court of the new State, now about to be organized. Such court will have plenty of time to fully consider all the questions involved in this case. None of the members of said court will be disqualified by reason of having

passed upon any of the facts involved in the case in the court below.

We think it proper to suggest that certainly no injury can be done to any one by a full consideration of this case by the full bench of the new State court, and a possible injustice arising from a hasty consideration may be averted or remedied. We think we could not more clearly convince the new State supreme court of the hasty consideration that was given this case by the late territorial supreme court than by reference to that portion of their decision in which they state that as the amount involved is large enough to bring the case within the jurisdiction of the Supreme Court of the United States, that if they err in their decision they have no doubt the losing party will take the case to that court for review and correction.

Without going over in detail all the points of the argument as made by counsel for plaintiff in error in their brief, we content ourselves in this petition with reference to such portions as were not referred to by the court in its decisions or which were hastily or imperfectly passed upon.

In the first place, the court seems not to have read or considered the evidence or even the extracts of the same contained in the briefs of either counsel, but the statement of the court as to what it understands to be the undisputed evidence in the case appears and reads so much like the statement of the case as contained in the first part of the brief of counsel for defendant in error as to readily lead one to the inference that the court copied and adopted it as their own statement without reference to the evidence. We think that by a careful inspection of the evidence, enough of
224 which is given in the abstract in the briefs of the respective counsel to give the court a proper idea of the case, a statement of the case could be properly made which would differ very much from that made by the court in its decision. There is no evidence in the case which clearly shows, as the court states, that the flat car was designed for the laborers to ride on to and from their work, or that the caboose was reserved for the use of the trainmen. The preponderance of the medical testimony does not justify the statement of injuries as set forth in the decision of the court; furthermore, the statement does not contain all that materially affects the case. It appears from the evidence that the defendant in error, together with his fellow-laborers, who were riding to their work upon the train, were under the charge or control upon said train of a foreman of their surfacing work, who was on the train riding to their work with them. The court also omits to state as a pertinent fact that the train on which they were riding to work was a work-train engaged in hauling the same gravel which they were — use in their surfacing work; that the foreman who had charge of them and their work directed where that gravel should be placed and how it should be distributed. All of the court conceded that the objectionable language of the trial court in its construction concerning gross negligence was open to criticism, one member of the court going further and saying that the language

used furnished ground for the reversal of the judgment of the court below. The majority of the court furnish as a reason for holding that the language used is not a ground for reversal that the trial court subsequently qualified and restrained the force of its words by cautioning the jury against prejudice or passion in making up their verdict. Such reasoning amounts practically to this: A trial court may say to the jury that which is clearly indicative of passion and prejudice of the court, and he can qualify and restrain it by practically saying to the jury, "I have exercised passion and prejudice [illegible]."

225 The trial court might with as much reason say to the jury, "What I am now instructing you is the law, but don't you follow it." A prejudice or passion aroused or excited by words so descriptive as to represent a train "coming dashing around the curve with its load of human freight, ignorant of the impending danger," is not liable to be readily allayed by a stereotyped formula of words merely expressive of a desire in a general way to have them lay aside passion and prejudice.

It is claimed by the court that the facts which are alleged to constitute negligence were established by undisputed evidence, and the court proceeds to say that this undisputed evidence shows gross negligence, and that the trial court was right in telling the jury as a matter of law that it was a case of gross negligence. From all the evidence in the case and from the course the argument and the decision have taken, we infer that the undisputed evidence referred to is the bare naked fact of the collision, which is taken by the court as *prima facie* evidence of negligence. We concede that this is true as between a railroad company and a passenger upon the train of that company coming into collision with another train of the same company, but we contend that it is not true as between the company and one of its employees. Upon this question see Kansas Pacific Railway Co. *v.* Margeret Salmon, adm'x, 11 Kansas, 72. This is a case where it was held that a person in the employment of a railway company, riding from his home to his employment in the caboose car attached to a freight train, without paying fare, according to custom and the understanding of the parties, from which car and train all persons except employees of the company are excluded, of which exclusion such person has full knowledge, is not a passenger, but only an employee of the company; and in which it is held that, as between the company and one of the employees of the company, the mere naked and unexplained fact of

226 & 227 a collision of two trains [illegible].

It is not true, as the court states, that in every case where it is undisputed that the collision which caused an injury complained of was the negligence of the party in charge or control that the matter of such negligence is determined as a matter of law by the court. For instance, in the case of Ross *v.* Railroad Company, in the 112 U. S., 377, upon which defendant in error and the court so much rely, there is the following language used: "It was not disputed on the trial that the collision which caused the injury complained of was the result of the negligence of the conductor of

the freight train in failing to show to the engineer the order which he had received to stop the train at South Minneapolis until the gravel train coming on the same road from an opposite direction had passed;" and the court charged the jury that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable.

Taking the position that we have in the printed brief which was filed in this case relative to the effect of the application to this case of the 1st section of the Code of Washington Territory, there does not come in question the doctrine of fellow-servants or the question as to who are fellow-servants, except as to what that doctrine was or how that question was determined under the common law of England, for we contend that the common law of England, and that law alone, is the only one that can govern or control any decision upon the question in this Territory. The United States courts, not excepting the United States Supreme Court, are as much bound to observe that provision of our code in passing upon a question of this kind as they would if it were a statute providing generally for the exemption of the master from liability for injury to one employee through the negligence of another.

If the case in the 112 U. S., so often referred to, undertakes to announce the doctrine of the common law, it certainly limits
228 the effect of its decision to the relation existing between a conductor and a railroad company where that conductor is given full charge and control, not only of the train, but of all persons employed on it, and is charged with the responsibility for its movements while on the road. The court, in the decision — the case at bar, in speaking of our attempt to distinguish the latter from the Ross case, merely refers to one distinction ma-.

The main distinction, however, that was made, and to which the court does not refer, was that while the rule of the company in the Ross case provided that the conductor should have charge and control not only of the train but of the persons employed on it, the rules of the Northern Pacific Railroad Company don't so provide. Again, the relations existing between the conductor of a work-train in the case at bar and the members of the surfacing gang riding to their work upon it was not such as to give the conductor charge of or control over them. They were engaged in effecting the same general object, carrying out the same general purpose, putting the track in shape and fitting it to be used for operation and general traffic purposes; they were all part of the general construction forces in one common employment, engaged for a common object. The court concedes that in the case at bar the work-train carrying the men was not running beyond the maximum rate allowed by the company, and it is not contended by any one that such rate of speed was dangerous or unreasonable; then the negligence, if any, must have been the negligence of the conductor and engineer of the train coming from the opposite direction.

We insist that if the test is one of charge or control of persons employed on the train, that the conductor of a train on which certain persons are not employed can certainly not have any control over such

persons It is perfectly clear that the decisions in the Ross case, which was decided by concurrence of five members and dissent of
229 four of the court, was intended to be limited to the particular facts of the case in which it was rendered; that is, it was intended to apply to such a conductor, acting under such orders and rules and situated as was such conductor as is mentioned in that case. That such is the construction and interpretation of said decision will be seen by reference to some of the United States court decisions, notably that of Howard and wife *v.* Denver & R. G. R'y Co., 26 Fed. Rep., 837. Attention is specially called to pages 840, 841, 842, 843, and 844. This was a case of a fireman of one train killed in a collision occasioned by the negligence of the engineer of another train. The train of the negligent engineer consisted only of a light engine. Under the rules of the company, the engineer of such an engine was regarded as both engineer and conductor; yet the court in that case say that the doctrine of the Ross case will not apply to it, but that the doctrine contained in the case of Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S., 478, does apply. The court also says that while the Ross case is a later expression of the Supreme Court, the opinion in the one case contains no reference, does not purport to overrule, and is — entire harmony with it. The language quoted by the court from the Randall case is applicable to the case at bar. The conductor and injured person in the case at bar were employed and paid by the same master; their duties brought them to work at the same place, at the same time; so that the negligence of the one doing the work might possibly injure the other in doing his work. Their separate services had an immediate common object: neither was working under the orders or control of the other; each by entering into his contract of service took the risk of the negligence of the other in performing his service.

230 And in the Randall case the court says that under such circumstances neither can maintain an action for an injury caused by such negligence against the corporation, their common master. In the case in which this language from the Randall case is quoted there is something said which applies equally well to the case at bar: "To make one as the controller of a department properly, his duties should be principally those of direction and control; he should have something more than the mere management of machinery; he should have subordinates, over whose various actions he has supervision and control, and not a mere assistant to him in his working of machinery; he should have control over an entire department of service, and not simply of a single machine in that service." The court, in its decision in that case, proceeds to say: "I think I only voice the general judgment of the profession in saying that the decision in the Ross case was a surprise, and that it carried the doctrine of departmental control to the extreme; to extend it to the case of an engineer running a light engine with no train, no subordinate save the fireman, would, it seems to me, be judicial legislation." In speaking of the contrast between the older and the more modern cases, the court says: "I am fully aware of the direction of modern rules. The views expressed and the prin-

ciples enunciated in the Farwell case may not be obviously and unquestionably correct; it is not improbable that ere long the rule of exemption laid down in that case may be entirely overthrown, but if overthrown it should be by legislative action, and not by judicial decision. The true path for judicial walk is, as I conceive, *super antiquas vias.*"

We briefly call to the attention of the court other decisions of the United States courts relative to this doctrine of fellow-servants and the limit placed upon the application of the Ross case.

Missouri Pacific Railway Co. — Texas Pacific R. R. Co, 31
231 Fed. Rep., 527.

Van Avery *v.* Union Pacific R'y Co., 35 Fed. Rep., 40.

Thompson, adm'r, *v.* Chicago, Milwaukee & St. Paul R'y Co., 18 Fed., 239.

We now pass to the question of contributory negligence. As stated before, there is nothing in the evidence to justify the inference that the flat car was used for the men to ride on and the caboose used exclusively for the trainmen. The evidence shows that laborers were on the caboose on that very day and at the time the accident occurred, men laboring in the same surfacing gang with the defendant in error. No one upon the train was injured except those on the flat car. Had defendant in error been on the caboose he would not have been injured. It makes no difference that he was on the flat car by the direction or assent of the employees of the company in charge of the train, or whether he was there with their knowledge or consent. The case of Railroad Company *v.* Jones, 95 U. S. Rep., 439, is decisive of this question. This was a case of a man, one of a party of laborers returning from work on a train consisting of a locomotive, tender, and box car, he riding on the pilot, and while there the train ran into cars loaded with ties standing in a tunnel. The accident was the result of negligence on the part of defendant. Nobody was hurt except those riding on the pilot. The court held that the knowledge, assent, or direction of the company's agents as to what he did is immaterial. As well might he have obeyed a suggestion to ride on the cow-catcher or put himself on the track of the wheels of the advancing locomotive. He was not an infant nor *non compos.* The injury was due to his own recklessness and folly; he was himself the author of his misfortune.

This is shown with as near an approach to a demonstration as
anything short of mathematics will permit. The court fur-
232 thermore says that if the company had prayed the court to
direct the jury to return a verdict for the defendant it would be proper to give such direction and error to refuse.

The attention of the court is also called to the case of Kresanowski *v.* Northern Pacific R. R. Co., 18 Fed. Rep., 229. This was a case of a laborer riding to work on an engine, the tender being full of wood. He with one or two others sat on the front beam of the engine with his feet over the pilot. He was badly injured by collision of the engine in which he was riding with another engine. The engine was furnished by the company for the convenience of

the gang in which he was employed. The accident was due to the negligence of a person engaged in the same common employment. The court refers to the case of Hough *v.* Railway Co., 100 U. S. Rep., 213, and quotes the language of that decision relative to the risks taken by one going into a known place of danger, and considering his contributory negligence on account of risking such dangers; he also refers to the case of Jones, heretofore mentioned. In speaking of the latter case the court says: "The Supreme Court of the United States expressly say that if he had gone there by direction of the company it would not make any difference; he still assumed the risk." Now, all the jury could be asked to infer in this case would be that the company authorized him to go there by reason of the fact *fact* that they didn't have sufficient accommodation for the men already in any other place, and as there was not room enough for all of them to go on the tank, that the company intended them to ride on the pilot or directed them to go there; but, as I say, it seems to me that the Supreme Court have met that very position by saying that that is immaterial; that even if the agents of the company did say, "You go here," it is a dangerous place, yet the danger
233 is open to the observation of every one, so that the party after he is invited to go there must be held to know the risks, and then if he chooses to go there he assumes the risks himself.

Reference on this subject is also made to—

Darwin *v.* Charlotte, Columbia & Augusta R. R. Co., 55 American Reports, 32.

Flower *v.* Pennsylvania R. R. Co., 69 Pa. St., 210.

Eaton *v.* Del. & L. R. Co., 57 N. Y., 382.

Everhart *v.* Terre Haute & Indiana R. R. Co., 78 Ind., 292.

New Orleans, Jackson, &c., R. R. Co. *v.* Harrison, 48 Miss., 112.

As to the matter of the burden of proof as to contributory negligence we cite:

Indiana, Bloomington & Western R'y Co. *v.* Green, 55 American Reports, 736.

Murray *v.* Gulf C. & S. F. R'y Co., 11 Southwestern Rep., No. 2, page 125.

On all other points involved in the case reference is made to the original brief on file in this case, and more particularly to a list of authorities selected from the number contained in said brief as those specially relied upon, copy of which list is hereto attached.

Your petitioner would respectfully request that the matters of this petition be carefully considered and the prayer of the petition granted and a rehearing of said case ordered.

J. H. MITCHELL, JR.,
Of Counsel for Plaintiff in Error.

Dated at Spokane Falls, W. T., May 4th, 1889.

234 In the Supreme Court, January Term, 1889.

List of Authorities of Plaintiff in Error to Which Special Attention of the Court is Directed.

In support of first point of brief.

Waldhier *v.* Hannibal & St. Paul R. R. Co., 2 Am. & Eng. R. R. Cases, 146 (71 Mo. Rep., 514).
Morse *v.* Minneapolis & St. L. R'y, 11 Am. & Eng. R. R. Cases, 168 (Minnesota case).
Batterson *v.* Chicago & Grand Trunk R'y Co., 8 Am. & Eng. R. R. Cases, 123, Michigan Case.

In support of second point of brief.

Baldwin *v.* Western R. R. Co., 4 Gray (Mass.), 333.

In support of third point of brief.

Chicago, Milwaukee & St. Paul R. R. Co. *v.* Ross, 112 United States Rep., 395.
Patterson's Railway Accident Law, pages 433 & 434.
Hoppe *v.* Chicago, Milwaukee & St. Paul R'y Co., 21 Northwestern Rep., 227.
—— *v.* M. C. R. R. Co., 111 U. S. Rep., 228.
P., W. & B. R. R. Co. *v.* Stebbing, 19 Am. & Eng. R. R. Cases, 36.
Bulger *v.* City of St. Paul, 14 Federal Rep., 567, Minnesota case.
P., W. & B. R. R. Co. *v.* Stebbing, 62 Maryland, 504.
Williams *v.* Northern Pacific R. R. Co., 14 Northwestern Rep., syllabus, p. 95; see pages 99 and 100, Dakota case.

In support of the point that the mere happening of a collision between two trains of the same company on the same track is not *prima facie* evidence of negligence of the company as to one
235 riding upon the train as an employee and not as a passenger, see—
Kansas Pacific R. R. Co. *v.* Salmon, 11 Kansas Rep., 83.

See also, as to this—

In support of the fourth point of brief.

Maher *vs.* Atlantic & Pacific R. R. Co., 64 Missouri, 267.
—— *vs.* C., B. & Q. R. R. Co., 40 Iowa, 205.
1st. Rorer on Railroads, 551.
Pierce on Railroads, 354.
2nd. Wood's Railway Law, 1097.

In support of fifth point of brief.

First, as to common law generally:

See authorities on pages 53, 54, and 55 of brief; also the following English cases:

Hutchison *v.* York, Newcastle & Berwick R'y Co., 5 Exch. Rep., 343.

See also Jacob Fisher's Digest, vol. 6, page 8906.

Morgan *v.* Vale of Neath R'y Co., 5 Best & Smith, 736; 1 L. R.

Queen's Bench, 409; see also Jacob Fisher's Digest, vol. 6, p. 8912.

Feltham *v.* England, 1 L. R. Queen's Bench, 33; 7 Best & Smith, 676.

See also Jacob Fisher's Digest, vol 6, p. 8912.

Wilson *v.* Murray, L. R. 1 House of Lords, Scotch Appeals, 326; see also Jacob Fisher's Digest, p. 8907.

Tenney *v.* Midland R'y Co., 1 L. R. Common Pleas, 281; 12 Jurist, N. S., 691; Jacob Fisher's Digest, vol. 6, p. 8913.

See also the following American cases:

Murray *v.* S. C. R. R. Co., 36 Am. Decisions, 268, South Caro-
236 lina case; see also p. 288.

Farwell *v.* Boston & Worcester R. R. Co., 7 Metcalfe (Mass.), 49.

Ryan *v.* Cumberland Valley R. R. Co., 23 Pennsylvania State, 384.

Gilshannon *v.* Stony Brook R'y Co., 10 Cushing (Mass.), 228; also pages 231 & 233.

Abena *v.* Terre Haute & Indiana R. R. Co., 17 Am. & Eng. R. R. Cases, 614; see same case, 111, *111* 202.

Newewolo Central & Centson River R. R. Co. *v.* Vick, 17 Am. & Eng. R. R. Cases, 609; 95 New York Rep., 267.

Kansas Pacific R. R. Co. *v.* Salmon, 11 Kansas Rep., 83.

Manville *v.* Cleveland, &c., R. R. Co., 11 Ohio State, 417.

Columbus & Indiana Central R. R. Co. *v.* Arnold, 31 Indiana Rep., 171 and 174.

Russel *v.* R'y Co., 17 New York Rep., 134.

Wood's Law of Master & Servant, 2nd ed'n, p. 816, note; see also section 424 and note; also section 435; also section 426 and 427 p. 831, note 9, same work.

Howland *v.* Milwaukee, Lake Shore & Western R. R. Co., 11 Northwestern Rep., 529, Wisconsin case.

Kan-er *v.* Railroad Co., 33 Ohio State, 150.

Wm. W. P. Dow *vs.* Kansas Pacific R. R. Co., 8 Kansas, 642.

P., F. W., &c., Rw. Co. *vs.* Lewis, 33 Ohio State, 196.

St. Louis & Southeastern R'y Co. *vs.* Britz, 72 Ill., 256.

Chi. & Alton R. R. Co. *v.* Keefe, 47 Ill., 108.

Gilman *v.* Eastern R. R. Co., 10 Allen (Mass.), 233.

McQueen *v.* R'y Co., 1 Pacific Rep., 139; 30 Kansas Rep., 689.

Pittsburgh, Fort Wayne & Chicago R. R. Co. *v.* Devinney, 17th Ohio State, syllabus, p. 198; see also pages 210, 211, 212, and 213.

Kielly *v.* Belcher Silver Mining Co., 3 Sawyer, 500; also pp. 502–'3.

Quincy Mining Co. *v.* Kitts, 3 Northwestern Rep., 240, Michigan case.

237 For decisions of the Supreme Courts of the United States see references to same on pages 65, 66, 67, and 68 of brief; see also—

Mo. Pac. R. R. Co. *v.* Tex. Pac. R. R. Co., 31 Fed. Rep., 527.

Naylor *v.* New York Central & Hudson River R. R. Co., 26 Federal Rep., syllabus, p. 837; see also pages 840, 841, 842, 843, 844, and 845.

Van Avery *v.* Union Pacific R. R. Co., 35 Federal Rep., pages 40–41.

Patterson's Railway Accident Law, sections 315 to 322, inclusive; see also section 324.

Wood's Law of Master & Servant, 2nd edition, section 435.

Of the cases cited on pages 72 and 73 of the brief, see—

Heine *v.* Chicago & N. W. R. R. Co., 17 Northwestern Rep., 420; 58 Wisconsin Rep., 528.

Pease *v.* Chicago & N. W. R. R. Co., 17 Am. & Eng. R. R. Cases, 527, Wisconsin case.

Slater *v.* Jewitt, 5 Am. & Eng. R. R. Cases, 515; 84 New York Rep., 61.

Buckley *v.* Gould & Curry Silver Mining Co., 14 Federal Rep., 833, Nevada case.

Connelly *v.* Minneapolis Eastern R'y Co., 35 Northwestern Rep., 582, Minnesota case.

Brown *v.* W. & St. Paul R. R. Co., 6 Northwestern Rep., 484, Minnesota case.

In support of sixth point of brief.

In addition to the cases of R. R. Co. *v* Jones, 95 United States Rep., 439, and Kresanowski *v.* Northern Pacific R. R. Co., 18 Federal Rep., 229, see also case of Darwin *vs.* Charlotte, Columbia & Augusta R. R. Co., reported in 55 American Reports, page —.

238 In support of the seventh point of brief.

Bonce *vs.* The Dubuque Street Railway Co., 5 Northwestern Rep., 177.

Raymond *v.* Burlington, C. R. & N. W. R. R. Co., Iowa case, 17 Northwestern Rep., 923; see also bottom of page 924 and top of p. 925, —— *v.* Mich. Central R. R. Co., Michigan case, 20 Northwestern Rep., 71.

Beach on Contributory Negligence, sections 155 and 156 and pages 432 and 433.

Smith *v.* Memphis and L. R. R. Co., 18 Federal Rep., 304, Tennessee case.

Morris *v.* Chicago, Milwaukee & St. Paul R. R. Co., 26 Federal Rep., 22.

Wharton on Negligence, sections 421 and 813.

STATE OF WASHINGTON, *Supreme Court,* } ss:

I, Sol. Smith, clerk of the supreme court of the State of Washington, do hereby certify that the within, above, and foregoing is a true copy of the petition for rehearing in the above-entitled cause, as appears by the original thereof now on file in my office.

Seal of the Supreme Court, State of Washington.

In testimony whereof I hereto set my hand and affix the seal of said court on this 3d day of February, A. D. 1890.

SOL. SMITH,
Clerk of Supreme Court of the State of Washington.

239 [Endorsed:] Filed May 7th, 1889. Francis Henry, clerk. ——— ———, dep't.

240 [Endorsed:] Supreme Court U. S. 1890, October term. No. 1560. The Northern Pacific Railroad Co., pl'ff in error, *vs.* David O'Brien. Stipulation and addition to record. Filed Feb'y 18, 1891.

Endorsed on cover: Case No. 14,425. Washington supreme court. No. 355. The Northern Pacific Railroad Company, plaintiff in error, *vs.* David O'Brien. Filed November 21, 1890.

1 65 155-141

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1560~~. 155

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

DAVID O'BRIEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

* * * * * * *

(Record, p. 2, 3.)

In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To David O'Brien, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, to wit, on October 13th, 1890, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein The Northern Pacific Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error

mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court of the United States, this 5th day of May, in the year of our Lord one thousand eight hundred and ninety.

[Seal of United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the District of Washington.

In the Supreme Court of the United States of America.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.

STATE OF WASHINGTON,
County of Yakima,

Daniel E. Lesh, being sworn, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and is the duly elected and qualified sheriff of Yakima county, in the State of Washington; that he is not interested in or a party to the above-entitled cause and is competent to be a witness on the trial thereof; that on the sixth day of May, 1890, at the city of North Yakima, in said Yakima county, he served on the above-named defendant in error, David O'Brien, the foregoing citation, filed in this cause with the clerk of the supreme court of the State of Washington, by delivering a true copy of the said citation to J. B. Reavis, attorney for the said defendant in error, David O'Brien, personally, in the said city of North Yakima, on the said sixth day of May, A. D. 1890.

DANIEL E. LESH,
Sheriff of Yakima County, Washington.

Subscribed and sworn to before me this sixth day of May, A. D. 1890.

[SEAL.] GEORGE COURTER,
Notary Public, Residing at North Yakima, Washington.

(Endorsed:) 604. In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'ff in error, *v.* David O'Brien, def't in error. Citation. Filed May 5th, 1890. Sol. Smith, clerk supreme court, State of Washington.

(Record, p. 4.)

NORTHERN PACIFIC RAILROAD Co., Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.
#604. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the fourth judicial

district of Washington Territory, holding terms at North Yakima, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 7th day of March, A. D. 1889, on motion of J. B. Reavis, of counsel for defendant in error, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed with costs, and that the said David O'Brien, defendant in error, have and recover of and from the said Northern Pacific Railroad Company, plaintiff in error, the costs of this action, taxed and allowed at —— dollars, and that *that* execution issue therefor.

And it is further ordered that this cause be remitted to the said district court for further proceeding in accordance with the opinion herein filed.

(Record, p. 4.)

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error. } #604.

The motion of plaintiff in error for leave to file a petition for rehearing in this cause and for the allowance of sixty days within which to file the same and for a stay of all proceedings in this cause, both in this court and in the district court in which said cause was tried, during said time and during the pendency of said petition, if filed within said time, having this day been brought on to be heard, and the court being fully advised in the premises, counsel for defendant in error consenting, grants said motion; and it is now therefore ordered that plaintiff in error have, and hereby is granted, leave to file a petition for rehearing herein, and that it be allowed sixty days from this date within which to file the same, and that all proceedings in this cause in this court, as well as in the district court in which said cause was tried, be stayed during said time allowed for filing said petition and during the pendency of said petition, provided the same is filed within the time allowed by this order.

(Record, p. 6.)

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error. } No. 604. Writ of Error to the Fourth District.

Opinion by Chief Justice Burke.

From the undisputed evidence in the record before us in this case it appears that in April, 1887, David O'Brien, the defendant in error, was employed by The Northern Pacific Railroad Company, the plaintiff in error, as a common laborer in the work of "surfacing" its

track between Cle-Elum and Martin, in Kittitass county, Washington Territory.

On the 21st of April, 1887, and for some days before that, this "surface gang" were engaged at work near a point on the Northern Pacific railroad about six miles west of Cle-Elum, known as Neison's Siding. For some time previous to the 21st of April the "surface gang" were taken to their work every morning from Cle-Elum on a gravel train provided for that purpose by the company; were brought back to Cle-Elum at noon for their dinner. After dinner, usually about 12.45 p. m., they were taken to their work again on the gravel train, and at night the same train brought them back to Cle-Elum. On the 20th of April, 1887, the conductor of the gravel train received his usual orders for the next day's work, directing to work between Cle-Elum and Nelson's Siding and to look out for trains going east. On the 21st of April another train belonging to the same company and consisting of a large, heavy engine intended for mountain work, a tender, and box car was sent out from Easton as a "wild train," with orders to flag against the gravel train working between Cle-Elum and Nelson's Siding. The engine of the wild train was out of repair and so badly disabled that it could neither start up nor start with anything like the promptness of such an engine in good order, and at the time in question was on its way to the company's repair shops, at Ellensburgh. The engine was reversing, the tender being in front. By the rules of the company "flagging against other trains" was rerequired to be done by sending a man ahead of the flagging train three-quarters of a mile with danger signals, and the person giving the signals was required to locate himself so as to be plainly seen, and to make the signals in such a manner as to be plainly understood. The conductor of the wild train sent a flagman ahead, but instead of keeping the train three-quarters of a mile behind him the train followed the *the* flagman so closely that they were not to exceed three to five hundred feet from them. About midway between Cle-Elum and Nelson's Siding there is a ten-degree curve, on one side of which is the Yakima river and on the other a rocky bluff of a considerable height. As the flagman turned the western end of this curve, his own train being not more than 300 or 400 feet behind him, he saw the gravel train from Cle-Elum approaching, but owing to the obstructions on the side of the track, which interrupted the view of the engine of the approaching train and the flagman, the signal could not be seen until the train was upon the flagman, and the result was the fatal collision between the two trains. The gravel train consisted of a flat car, which was in front of an engine, and a caboose car. There were about thirty laborers, including defendant in error, upon the flat car. This flat car was driven by the force of the collision into the tender of the engine of the other train. Seven men were killed outright and more or less seriously injured. The defendant in error was hurled from the car by the shock of the collision, falling upon his head upon the rocks upon the bank of the river some fifteen or twenty feet from the track. When found he was unconscious. His head was badly cut; one of his teeth knocked out; his right clavicle

was broken; he was badly bruised and lacerated on other parts of his body. The collision occurred between 12.50 and 1 o'clock in the afternoon of the 21st. So far there is no dispute as to the facts. The evidence as to the rate of speed at which the gravel train was running at the time of the collision was somewhat conflicting, some of the witnesses putting it as high as thirty-five miles an hour, and some as high as twelve miles an hour. To our minds the evidence warrants the belief that the train was running at about eighteen miles an hour, the highest rate of speed allowed by the rules of this company. The evidence moreover clearly shows that the flat car was designed for the laborers to ride upon to and from their work, and that the caboose was reserved for the use of the trainmen. That this disastrous collision was caused by the gross negligence of the conductor and engineer of the train going down to Ellensburgh—that is, the "wild train"—there can be no doubt whatever. It would be difficult to conceive of a case of more wanton, inexcusable negligence than that of which the conductor and engineer of that train were guilty. They must have known from the time they left Nelson's Siding that the gravel train was then on its way from Cle-Elum, carrying laborers to their afternoon work, and that the two trains must inevitably meet somewheres on that six-mile stretch; yet, with this knowledge and in direct violation of the rules of the company and of ordinary prudence, they ran their train over the sharpest curve on the line, leaving the flagman only three hundred feet ahead of them to warn the approaching train of the danger. Exceptions have been taken to the instructions of the court below on this head; and, as counsel for the plaintiff in error has laid great stress upon this exception, we give the instruction complained of:

The train with which Hulett's train collided and which had orders to flag against Hulett's train had no business to be where it was at the time of the collision. It should have remained at the point where the flagman was put off and sent forward until he had procured a sufficient distance forward to guard against accidents, but instead of that the train followed behind the flagman only a few hundred feet, and was thereby placed in a position where it was impossible to prevent a collision with the train which came dashing around the curve with its load of human freight, ignorant of its impending danger."

This was gross negligence on the part of those in charge of said train, and, the facts being undisputed, it is the duty of the court to tell you so and not to confuse you with abstract definitions of negligence which you may not understand alike, and may therefore have difficulty in applying."

We think the instructions correctly stated the law applicable to the facts of this case. Negligence is a question of mingled law and fact. Where there is any conflict in the evidence the question is submitted to the jury under proper instructions; but whether a given state of facts constitutes negligence in any case is the question of law for the courts. In this case, as we have seen, the facts which are alleged to constitute the negligence were established by undis-

puted evidence. In such case it becomes the duty of the court to declare as a matter of law whether the facts constitute negligence.

I Sherman and Redfield on Negligence, secs. 52, 53, and 56.
Dascomb *vs.* Buffalo, etc., R. Co., 27 Barb., 221.
Catawassa R. Co. *vs.* Armstrong, 52 Penn. St., 282.
Carter *vs.* Tome, 103 Mass., 507.

This the court did in language to which, indeed, exceptions have been taken, but which, though open to criticism, does not furnish ground for the reversal of the judgment below.

The court in subsequent parts of the charge qualified and restrained the force of his words in the instruction, and particularly cautioned the jury against prejudice or passion in making up their verdict. But admitting the collision was caused by gross negligence of the conductor and engineer of the wild train, it is contended on behalf of the plaintiff in error that under the rule which exempts the master from liability to a servant from injuries caused by negligence of a fellow-servant in the same common employment the railroad company cannot be held responsible to the defendant in error in this case. This, it seems to us, presents the only question of real difficulty in this case.

If the conductor and engineer were fellow-servants of the laborers working on the track and engaged in the same common employment, then the company is not liable to the defendant in error for the injuries he received in the collision. The general rule of law on this subject is well settled, but as it was interpreted in the Farwell case, 4 Met., 49, and in other cases following the Farwell case, its injustice long ago became so manifest and was so frequently dwelt upon, both by text writers and courts, that in recent years the courts have shown a strong tendency to graft important limitations upon the general doctrine. In some of the States the Legislatures have abolished the rule altogether, and in England the rule was carried to such an extent that in 1880 Parliament felt called upon to interfere, and the result was the "employer's liability act." It is not, however, our purpose to review the authorities upon this rule or to discuss it at any length, for we think that the recent decisions of the Supreme Court of the United States upon this subject are decisions of this case, and, as the amount involved is large enough to bring the case within the jurisdiction of that court if we err in our decision, we have no doubt the losing party will take the case to the Supreme Court for review and correction. In our view, then, of the law the conductor and engineer of the "wild train" were not fellow-servants of the laborer O'Brien, the defendant in error in this case, or engaged in the same common employment with him. One of the rules of the Northern Pacific Railroad Company expressly provided that "trains are to be run under the direction of the conductor, except when such direction conflicts with these rules or involves risk or hazard, in which case the engineer will be held equally responsible." These men were not only engaged in totally different departments of work, but

they stood in a different relation to their common principal. The conductor and engineer were "agents of the corporation, clothed with the control and management of a distinct department of the business of the company." They had on this occasion the entire control and management of the train and were to all intents and purposes the personal representatives of the company, for whose negligence it is and ought to be responsible to the defendant in error and other subordinates similarly employed.

On page 394 the court, in C., M. & St. P. R'y Co. *vs.* Ross, used this language:

The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

Chicago, M. & St. P. Co. *vs.* Ross, 112 U. S., 377.

The case then stands the same as it would if the president of the company or the board of directors were on the train commanding and directing its movements and committing the acts of gross negligence here imputed to the conductor and engineer. No one questions that when the master himself is guilty of negligence resulting in an injury to one of his servants that the master is responsible for such injury. An attempt has been made here to distinguish the case at bar from Railway *vs.* Ross by the circumstance that, in the latter case, the injury was caused by the conductor of the train on which the injured person was employed at the time, whereas in the case at bar the person whose negligence caused the injury was conductor of another train and not of the train on which the injured person was riding. We can see no difference in principle between the cases. In each case the party guilty of negligence stood as vice-principal. He represented the company; he was engaged in a totally different department of labor from that in which defendant in error was employed, and he stood in a very different relation to their common principal.

N. P. R. R. Co. *v.* Herbert, 116 U. S., 642.
Cunard Steamship Co. *v.* Carey, 119 U. S., 245.

We will now briefly notice the other exceptions relied upon by plaintiff in error to reverse the judgment of the court below.

The court below charged the jury that the burden of proof as to contributory negligence rested upon defendant. To this the defendant excepted. We think that the charge of the court upon this point was a correct statement of the law. It is true that in some States a different doctrine prevails; but in our view the better reason, as well as the weight of authority, is with the courts holding

that the burden of proof is upon the defendant to show contributory negligence upon the part of the plaintiff in cases of this character.

1 Shannon and Redfield on Negligence, 4th ed., secs. 108, 109.
Hough *v.* Railroad Co., 100 U. S., 213.
N. P. R. R. Co. *v.* Mass., 123 U. S., 710, 721.
Indianapolis R. R. Co. *v.* Holst, 93 U. S., 291.
R. R. Co. *v.* Gladmon, 15 Wall., 401.

Exception was taken by the plaintiff in error to the admission of evidence under the complaint tending to show defects in the engine, and also to the admission of evidence introduced to show what defendant in error had been working at prior to the collision and what wages he had generally received. The object of this latter testimony was to furnish some basis for the estimation of the damages which defendant in error claimed to have suffered. We do not think the exceptions were well taken in either case. The allegations in the complaint were broad enough to cover such testimony; even if they were not this would furnish no ground of exception in view of section 105 of our Code. We find no error in the record, and the judgment of the district court is therefore affirmed.

THOMAS BURKE,
Chief Justice.

I concur.
WM. G. LANGFORD,
Asso. Justice.

(Record, p. 13.)

Opinion by Allyn, Asso. Justice.

I do not concur in the opinions filed herein. While the result may be justified by the facts of this particular case, I cannot approve of certain of the instructions as set out in the opinion. I doubt greatly the propriety of the court assuming to take the question of negligence from the jury. The case should be very exceptional where this may be done at all, and in this case the result of this was to ignore all explanation offered and excuse presented as insufficient, on the sufficiency of which I feel the jury may much more safely pass than the court.

But the language and manner of the instruction (being the instruction first quoted in the opinion) is certainly subject to criticism. In this class of cases (personal injury) jurors are ordinarily ready enough to see these features and need no graphic picture of the scene in the charge.

The court cannot too carefully avoid language which may imply to the jury possible feeling or in the most remote way (though not intended) influence them. The tendency of courts to refer to and comment on the evidence and thus take from the jury that which is exclusively given to their keeping cannot be too carefully avoided or too strongly guarded against. In my judgment the choice of terms by the lower court was (that to which I have referred) unfort-

unate and properly subject to criticism, while I am equally satisfied they were not so intended and merely the result of oversight incident to a necessarily hasty consideration at the trial of a very large number of instructions, as may not unfrequently happen.

FRANK ALLYN,
Asso. Justice.

(Filed March 8th, 1889.)

(Record, p. 14.)

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
DAVID O'BRIEN, Defendant in Error.
} No. 604.

Decision of the supreme court of the Territory of Washington having been heretofore, on the 7th day of March, 1889, rendered in the above-entitled cause in favor of the defendant in error, affirming the judgment of the district court of the fourth judicial district of Washington Territory, holding terms at North Yakima, in the county of Yakima; and, on the said day, an order having been made by said supreme court, counsel for the defendant in error consenting, giving plaintiff in error sixty days' time within which to file a petition for rehearing and staying all proceedings on said judgment in said court, as well as in said district court, during the time provided for the filing of said petition and during the pendency thereof; and the said supreme court having on said day made an order granting plaintiff in error, in the event of the denial of said petition when the same should be heard and determined, a period of sixty days within which to perfect proceedings upon appeal to the Supreme Court of the United States and providing a stay of proceedings as before during the said period of sixty days; and the said petition having been filed within the time provided by the order of said court and having been pending undetermined at the time of the admission of the State of Washington and the organization of this the supreme court of said State, and this court having directed the defendant in error to answer said petition, the said answer having been filed within the time provided by said order, and said petition and answer having been taken under advisement by this court: Now, on this 8th day of March, A. D. 1890, the court, being fully advised in the premises, denies said petition for rehearing; to which ruling and judgment, as well as the judgment of the supreme court of said Territory affirming the judgment of said district court, plaintiff in error, by its counsel, excepts, and said exception is allowed. And now, on this 8th day of March, 1890, the motion of plaintiff in error for the allowance of a writ of error to the Supreme Court of the United States and the granting of a supersedeas thereon in the above-entitled cause having been on this day brought on to be heard, and it now, on the same day, appearing to the court from the affidavit of John H. Mitchell, Jr., counsel for plaintiff in error, and

from the papers, records, and files in this cause that the value of the matter in dispute in the above-entitled cause exceeds the sum of five thousand dollars, exclusive of costs, and the court, being otherwise fully advised in the premises, grants said motion:

Now, therefore, it is ordered by the court that a writ of error to the Supreme Court of the United States to the judgment of the supreme court of the Territory of Washington, now a record of this court, and to the judgment, order, and ruling of this court upon the petition for rehearing be, and hereby is, allowed.

And it is further ordered that the plaintiff in error be, and hereby is, given and allowed sixty days from this date within which to file a supersedeas bond and security for the prosecution of said writ of error, and that said supersedeas bond be, and hereby is, fixed at the sum of twelve thousand dollars.

And it is further ordered that all proceedings upon the judgment heretofore rendered in this cause by the supreme court of said Territory and upon the orders made in this court in pursuance thereof, as well as all proceedings in this cause in the district court of said Territory heretofore referred to or such superior court as has by operation of law become the successor of said district court, be, and hereby are, stayed during said time allowed for the filing of said bond, and that upon the filing of the said bond all said proceedings be stayed during the pendency of said writ of error, provided said bond is filed within the time required by this order.

And it is further ordered that the Honorable T. L. Stiles, judge of the supreme court of the State of Washington, be, and hereby is, designated as the judge who shall take and approve the security which shall operate as a supersedeas upon the suing out of said writ of error and who shall issue the citation upon said writ of error.

* * * * * * *

155-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

NORTHERN PACIFIC R. R. Co.,
Plaintiff in Error,

vs.

DAVID O'BRIEN,
Defendant in Error.

No. 1560.

Error from the Supreme Court of Washington as Successor to the Supreme Court of the Territory of Washington.

Brief of Defendant in Error on Motion to Dismiss Writ of Error.

JOHN PAUL JONES,
REESE H. VOORHEES,
J. B. REAVIS.
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890. No. 1560.

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

DAVID O'BRIEN, DEFENDANT IN ERROR.

Error from the Supreme Court of Washington as Successor to the Supreme Court of the Territory of Washington.

Now comes the defendant in error in the above-entitled cause, by his attorney, and moves the Honorable Court that the writ of error brought to this Court by the plaintiff in error be dismissed for the following reasons, to wit:

Right to a writ of error was had by statute from the Territorial Court from final judgments.

At the time of admission of the Territory into the Union as a State the case was still pending in the Territorial Court and a final determination on the merits had not been reached. In this condition the case passed to the State Court as successor to the Territorial Court, and the State Court by its decision added the element of finality to the judgment of the Territorial Court. At the time of admission the right to the writ did not exist, judgment not being final. From the judgment which became final in the State Court the right to the writ does not exist because no federal question is involved.

Therefore this Court cannot entertain the writ of error because it is without jurisdiction in the premises.

JOHN PAUL JONES,
Attorney for Defendant in Error.

Service of this notice of the motion to dismiss herein to be submitted Monday, 2d day of March, 1891. Acknowledged January 20, 1891.

A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

NORTHERN PACIFIC R. R. Co.,
Plaintiff in Error,
vs.
DAVID O'BRIEN,
Defendant in Error.
} No. 1560.

Error from the Supreme Court of Washington as Successor to the Supreme Court of the Territory of Washington.

Brief of Defendant in Error on Motion to Dismiss Writ of Error.

Statement.

This suit was originally brought by David O'Brien, the defendant in error, in a District Court of the Territory of Washington, against the Northern Pacific Railroad Company, plaintiff in error, to recover damages for personal injuries sustained through the negligence of said company, in whose employ he was, while being carried on a train on the said railroad to the place where his labor was to be performed.

The cause having been tried in the Territorial District Court in October, 1887, judgment was rendered in favor of the defendant in error in the sum of six thousand ($6,000) dollars; from which judgment a writ of error was taken by the plaintiff in error to the Supreme Court of the Territory, by which court the judgment below was affirmed in January, 1889.

Thereupon the plaintiff in error obtained leave to file a petition for a rehearing within forty days, and after the adjournment of the said Territorial Supreme Court.

The effect of the petition, as provided by the Code of Washington, was to suspend the decision and all proceedings. (Code of Washington, Sec 482.)

On the 11th day of November, 1889, while the petition for a rehearing was pending, the Territory of Washington was admitted into the Union as a State under the provisions of the enabling act of February 22, 1889. (25 U. S. Stats., 676.)

After the admission, in January, 1890, the Supreme Court of the State ordered the plaintiff in error to serve a copy of the petition upon the defendant in error within thirty days, and that defendant in error file his answer to the petition within thirty days after service of the said copy.

Plaintiff in error, in conformity with such order, served a copy of its petition upon defendant in error, and thereupon defendant in error filed his answer.

The Supreme Court of the State thereupon rendered judgment denying the petition for rehearing. Whereupon plaintiff in error sued out its writ of error from the Supreme Court of the State, as successor to the Supreme Court of the Territory, to this court.

The defendant in error asks for the dismissal of the writ of error on the ground that this court can not entertain it for want of jurisdiction.

Brief.

Section 22 of the enabling act (25 U. S. Stats., 683) gives the right of appeal, or writ of error, to either party to a decree or judgment rendered by the Supreme Court of the Territory, as follows:

"And that from all judgments and decrees of the Supreme Court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgments shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union."

The words "all judgments and decrees" are somewhat broad, and were they to be construed by themselves might be held to mean interlocutory as well as final judgments and decrees. But the act qualifies them by saying—

"The parties to such judgments shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union."

We turn, therefore, to the law which defined their right prior to the admission, to put a limitation upon these words. The law is found in section 1911 of the Revised Statutes, and these words, "all judgments and decrees," are there declared to mean all *final* judgments and decrees only, as follows:

"Writs of error and appeal from the final decisions of the Supreme Court of Washington Territory shall be allowed, and may be taken to the Supreme Court of the United States."

U. S. Rev. Stats., Sec. 1911.

Therefore, only in final judgments and decrees will a writ of error lie to this court, and in the interpretation of the judiciary act (1789) it is so held.

Rutherford *et al. vs.* Fisher *et al.*, 4 Dall., 22.

Therefore, again, if the judgment of the Territorial Court, from which the writ was taken, was not a *final* judgment, that fact will be a conclusive negative of jurisdiction.

A final judgment is defined by Bouvier to be "one which puts an end to a suit."

A final judgment, to give it appellate jurisdiction, has been declared by this court to be one which definitely puts an end to all litigation between the parties upon the merits.

Bostwick *vs.* Brinkerhoff, 16 Otto, 3.

In County of St. Clair *vs.* John B. Lovington, (18 Wall., 628) a writ of error was taken to this court from the Supreme Court of the State of Illinois, which had reversed the court below and remanded the cause.

This court, in dismissing the writ because of the want of finality to the litigation on the merits, say:

"The issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered, which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case."

In Parcels, Pl'ff in Error, *vs.* Johnson (20 Wall., 653, 655), in dismissing a writ of error for want of finality to the decree below, the court said:

"Thus it is apparent that the parties have not yet exhausted the power of the state courts in the premises,

and until that is done our power can not be called into action. This court must be the last resort of litigants in the state courts."

In view of this well-known rule, it can hardly be maintained that after the permission of the court of the Territory had been obtained by the plaintiff in error to file a petition for a rehearing, and such petition had been filed and was under the consideration of the court—was still pending, the plaintiff in error could have sued out its writ of error—could have had its petition for a rehearing in the court below and its writ of error to the court above at one and the same time.

The filing of the petition for a rehearing deprived the decision of the Territorial court of its finality; it was no longer a conclusive determination of the merits of the case. It then became a matter of discretion with the court—a pending question—whether the decision should *become* a final one, or whether it should lose all vitality. In the words of this court, just quoted, the want of finality at that time was such that—

"The issue between the parties may be again tried in the circuit court [district court], and another judgment might be recovered which might be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case"; and "it is apparent that the parties have not yet exhausted the power of the State [Territorial] court."

But further, under the provisions of the Code of the Territory as well as of the State, by the filing of the petition the decision was made as impotent and ineffective, while such petition was pending, as though it had never been rendered, leaving the final adjustment of the differences between the parties as much of an uncertainty as when the suit was first brought.

The judgment could not operate, execution could not issue.

"If a petition for rehearing be filed, the same shall suspend the decision of the court on its presentation,"

Code of Washington Territory and State, Sec. 482.

In Beebe *et al. vs.* Russell, (19 How., 283) in dismissing a writ of error because the decree on which it was based was not final, the court spoke of the Forgay case (6 How., 200), in which the decree was adjudged final, and explained the elements in that case which it deemed necessary to adjudge finality upon. It said:

"In Forgay's, it was made upon the decree given by the court below, and it was adjudged by the court to be final to give the court jurisdiction of it. But it was so, *upon the ground that the whole merits of the controversy between the parties had been determined, that execution had been awarded*, and that the case had been referred to the master merely for the purpose of adjusting the accounts."

In the case at bar there needed still another judgment to determine whether the plaintiff or defendant should ultimately succeed in the litigation; the judgment of the Territorial court could never operate without it. This final judgment, which put an end to the suit, and definitely settled below the merits of the case, was rendered by the *State court.*

Such was the right of the parties to a writ of error "had by law prior to the admission of said State into the Union" and at the time of such admission.

The enabling act gives them after admission, only such rights as they had before it.

A writ of error would not lie then, and, under that act, will not lie now.

If the plaintiff in error can not have its writ under the

enabling act, it must maintain its right thereto under the rules governing writs of error from the State Supreme Court (U. S. R. S., sec. 709), to which the pending cause passed, and by which the petition for rehearing was dismissed and judgment rendered final under the provisions of section 23 of the said act.

There is no Federal question involved in the case at bar giving this court jurisdiction of it on error from the State Supreme Court, and, therefore, neither on this ground can the claim of jurisdiction be maintained.

The loss of its writ of error by the plaintiff in error is the result of its own voluntary act, and it has no right to complain of the results. It elected its forum in the State.

It intended to take advantage of the admission of the State to have still another court pass upon the merits of its case, one which had not already adjudged against it, and one free from the bias of a prior adverse decision, before seeking relief here.

This is clearly shown by its petition, in which it says:

"This petition, however, while made and filed during the time of the Territorial government, will undoubtedly be presented to and considered by the Supreme Court of the new State, now about to be organized. Such court will have plenty of time to fully consider all the questions involved in this case. None of the members of said court will be disqualified by reason of having passed upon any of the facts involved in the case in the court below.

We think it proper to suggest that certainly no injury can be done to any one by a full consideration of this case by the full bench of the new State court, and a possible injustice arising from a hasty consideration may be averted or remedied."

The Code provided that "The petition for rehearing shall be the argument of the applicant therefor, and if

the court think that such argument requires a reply, it shall so indicate to the other party." (Code, Sec. 483.) It will be noted that advantage was taken of this provision of the Code, and that the petition is a full and comprehensive argument upon all the merits of the case, so full and comprehensive that the State Supreme Court determined that it needed a reply and ordered defendant in error to make it, which defendant in error did. Thus plaintiff in error secured, upon a full presentation of the merits of the case, the consideration of a new and distinct tribunal in addition to the one in which it had asked for a rehearing.

From the wording of the petition it is a fair and unavoidable conclusion that the motive for filing it was *not* to secure a second hearing by the *same* court which had already passed upon the case, but was to secure a hearing and final judgment from the new State court.

Had the plaintiff in error not desired the State court to render final judgment upon the merits it had only to dismiss its petition for rehearing, prior to admission, to retain its right to its writ from the Territorial court.

Having chosen its course because of advantages which it hoped to derive from the political change in progress, advantages not possessed by litigants under ordinary circumstances, it should not now be heard to complain because such course was attended by certain burdens and restrictions.

JOHN PAUL JONES,
REESE H. VOORHEES,
J. B. REAVIS,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1890. No. 1560.

NORTHERN PACIFIC RAILROAD CO., PLAINTIFF IN ERROR,

vs.

DAVID O'BRIEN, DEFENDANT IN ERROR.

Response to the Motion to Dismiss.

Not being favored with the record in this case, printed in part or in whole, we know what is involved in it only from the motion to dismiss filed by defendant in error and his brief in support thereof, and this response is based solely on the statements contained in such brief and motion.

If it be true, as stated in such motion and brief, that the Code of Washington gives effect to a motion for rehearing to suspend the decision and all proceedings, yet, if the plaintiff in error had sued out his writ of error pending the motion to rehear, this would have been construed and held as a waiver or abandonment of the motion for a rehearing; that is all, and his writ of error would have held to bring the case to a final decision.

This is the logical conclusion of *United States* v. *Hodge*, *6 How., 279*, which will be again referred to hereinafter.

From the statement in the brief of the defendant in error it appears that a judgment was rendered against the plaintiff in error in the District Court of Washington Territory in October, 1887. The judgment was affirmed, on appeal, by the Supreme Court of the Territory. The plaintiff in error, upon leave of the Court, on the same day by consent of O'Brien's counsel filed a petition for rehearing. Under the Code of Washington further proceedings were suspended by the filing of such petition (Sec. 482). This, however, would have been the effect of the petition, under the practice, in the absence of the provision of the Code.

Before the petition for rehearing was disposed of the Territory became a State under the provisions of the act of Congress of 22d February, 1889 (25 Stat., 676, 682-3).

The case was, pursuant to the statute, transferred to the Supreme Court of the State of Washington, where the petition for rehearing was considered. The Supreme Court of the State of Washington, by the provisions of the act of Congress (*supra*), had become the successor to the Supreme Court of the late Territory.

The petition for rehearing was answered by counsel for defendant in error pursuant to the order of the Supreme Court of the State.

The Supreme Court of the State of Washington denied the petition for rehearing, and the ruling of the Court was excepted to by counsel for plaintiff in error.

The petition for rehearing having been denied, the judgment of the Supreme Court of the Territory remained the judgment of the Court, as of the date of the decision and entry thereof, by the Territorial Court. It will be observed that the Supreme Court of the State of Washington regarded and treated the judgment of the Supreme Court of the Territory as the final judgment in this case.

Hence, the judgment from which the writ of error is sued out is the final judgment of the Supreme Court of

the Territory of Washington, but pending, by removal under the law, in the Supreme Court of the new State. The judgment is a final decision of the Supreme Court of the Territory, and one from which a writ of error will lie to this Court (R. S., 1911). The mandate will be directed, when the case is finally decided, to the Supreme Court of the State, where the case is now pending under the law.

Hunt v. *Palao et al., 4 How., 589; commented on and explained in Benner et al.* v. *Porter, 9 How., 235, 245, et seq.*

There is no such embarrassment here as was found in the act admitting Florida and passed upon by this Court in *Benner et al.* v. *Porter, 9 How., 235.* And the legislation of Congress admitting Washington is free from the objections found in the acts admitting Wisconsin, etc., passed upon in *McNulty* v. *Batty, 10 How., 72.*

The act of Congress under which Washington is admitted as a State makes ample provision for maintaining this writ of error. It provides (1) that all cases of appeal or writ of error * * * that may hereafter lawfully be prosecuted upon any record from either of said Courts (referring to the Courts of the different new States mentioned in the act) may be heard and determined by said Supreme Court of the United States; (2) and that from all judgments and decrees of the Supreme Court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States, prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union (§ 22); (3) the Supreme Court of the State is made the successor of the Territorial Supreme Court, and all the files, records, indictments, and pro-

ceedings relating to cases pending in the Territorial Supreme Court, are required to be transferred to the Supreme Court of the State, to be proceeded with therein in due course of law; and no cause or proceeding was to abate by reason of the admission of the States, but, in this instance, the case was to be transferred and proceeded with in the Supreme Court of the State (§ 23).

All of these things were done; and after all it was only a change of procedure over which the parties had no control. The Supreme Court of the Territory and the Supreme Court of the new State became one and the same court for the purposes of this case. If the plaintiff in error had a right to the writ of error from the judgment of the Territorial Supreme Court under the law, the change in the procedure or in the remedy did not affect such right. (*End. Int. Stat.*, §§ *282, 287.*) The act of Congress saved the right of the plaintiff in error to sue out the writ of error; but, if there had not been specific legislation upon the subject in the act, there is sufficient provision for the writ of error in the second section of "An act supplementary to the act entitled 'An act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases, and for other purposes.'" (*9 Stat., 212, 131; Express Company* v. *Kountze Bros., 8 Wall., 349.*) And a year's time is given by these acts, after the admission of a State, in which to take an appeal or sue out a writ of error.

But when and where was the final judgment rendered in this case? We say it was in the Supreme Court of the Territory, when the judgment of the District Court was affirmed. (*Freem. Judg., Sec. 85.*) Without such final judgment the petition for rehearing could not have been entertained by the Court. In other words, the final judgment was the foundation of the petition for rehearing. And the order made by the Court in relation to such petition was interlocutory. Among the numerous

orders which this court has held not to be final judgments and decrees, because they are within the sound discretion of the Court, is the order refusing to grant a new trial.

Daswell v. *DeLanza et al., 20 How. 29; see 7 Am. and Eng. Encyc. of Law, on final judgments and decrees of the U. S. Statutes, pp. 966 to 973, and note 2 on p. 973.*

The State courts have uniformly held that judgments or orders granting new trials are interlocutory.

Lawson v. *Moore, 14 Ala., 274.*
Ex parte Sims, 44 ib., 248.
Broyles v. *Maddox, 43 ib., 327.*
White v. *Harvey, 23 Ind., 55.*
House v. *Wright, 22 ib., 383.*
Melcher v. *Frendenburg, 18 ib., 180.*
McDonough v. *Nicholson, 46 Mo., 35.*
Byers v. *Butterfield, 33 ib., 376.*
Artman v. *West Point Man'fg Co., 16 Neb., 572.*
Houston v. *Starr, 12 Tex., 424.*
Stewart v. *Jones, 9 ib., 469.*

This Court has decided so frequently and so recently that the rulings of the courts below, upon motions for rehearing, are not reviewable here, that authorities need not be cited.

See, however, Danf. Dig., 764.

So no question is presented here upon the ruling or orders of the Supreme Court of the State of Washington, upon the motion for rehearing.

Nor was the filing of the petition for rehearing a waiver of the right to the writ of error.

United States v. *Hodge et al., 6 How., 279, 283.*

We think it is apparent that the judgment from

which the writ of error was allowed in this case, was a final judgment of the Supreme Court of the Territory of Washington, in a case arising within the limits of the new State prior to its admission, and one from which the parties thereto had the same right to prosecute a writ of error to this Court, that they would have had by law prior to the admission of such State into the Union; and this is the only question presented by the motion to dismiss. If the plaintiff in error is in this Court from a final judgment of the Territorial Court, this motion to dismiss cannot prevail.

If, however, this is a writ of error from a final judgment of the Supreme Court of the State, rendered in the case and upon the proceedings transferred under the statute to that Court, we still contend that the plaintiff in error is entitled to the writ of error.

25 Stat., 682–3, §§ 22, 23.
9 ib., 128, 212.
Express Co. v. *Kountze Bros., 8 Wall., 349.*

The case went out of the Territorial Court to the State Supreme Court, and was there finally and definitively decided, and no quarrel is made by the defendant in error as to the regularity or lawfulness of this proceeding. To this final and definitive decision of the State Court plaintiff sues out this writ of error, and defendant complains this Court cannot entertain jurisdiction because no federal question is presented in the record.

To state it differently and to simplify it somewhat, the railroad company, under the law, had the right to make a motion for rehearing in the Territorial Court, and if overruled and the case finally passed into judgment, it had the right to review that judgment here by writ of error; and under the law, pending this case in the Territorial Court, Statehood having overtaken and fallen upon the Territory, the company had a right to

take the case into the State Court, just as it stood when the Territory was merged into a State, and have a final determination in the State Court. But here defendant says the company must stop; it cannot go any further. If this be true, the company is in an unfortunate and ugly predicament—no doubt of that; and this, too, brought about by the law, confessedly.

No construction of a law is to be tolerated that deprives a person of any legal right he possesses, before and at the time of the passage of such a law. The right to review here existed when the law lifted this Territory up into the sisterhood of States; and the law gave the right to stop the case there and carry it entire to the Supreme Court of the State. Is it possible it could be carried there with a loss of a single right already existing? Did it not go into the State Court, precisely and just as it was pending in the Territorial Court, with all the rights of all the parties intact? If not, then truly this is an instance where the law is a snare and a delusion of the first class.

End. Int. Stats., §§ *285, 286, 287.*
Larkin v. *Saffarans, 15 Fed. Rep., 148, 150, and cases cited.*
People v. *Tibbitts, 4 Cow., 384.*
Hunt v. *Palao et al., 4 How., 589, commented on and explained in Benner* v. *Porter, 9 How., 235, 245, et seq.*
People v. *Livingstone, 6 Wend., 526.*

But outside of general rules of construction, do not the very acts referred to by us above, as well as by defendant in error, show this right to exist, just exactly as it does in reference to decisions in the Territorial Court?

25 Stat. 682–3, ch. 180, §§ *22, 23.*
9 ib. 128, ch. 17.
9 ib. 212, § *2, ch. 12.*
Express Company v. Kountze Bros., 8 Wall. 349.
McNulty v. Batty, 10 How. 79.

Then it would appear this right is specifically preserved by the various enactments touching the practice and procedure in these Territorial Courts, and afterwards State Courts; and no Federal question is needed to give this Court jurisdiction in a case like this.

If this is not so the definition of this right would exhibit a species of legerdemain in law-making unheard of in this country. From our Constitution down to the latest of our statutes, in all relations affecting debts, citizens in anyway, Territories and States by change of status, or what not, rights as they stood, when the change occurred, are respected and upheld. And it would be a little too curious for the ordinary American intellect, if this just and unquestioned principle had been ignored in matters like the one here presented.

A. H. GARLAND,
H. J. MAY,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of [illegible]

OCTOBER TERM, 1900.

NORTHERN PACIFIC R. R. CO.,
Plaintiff in Error,

vs. No. 65.

DAVID O'BRIEN,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE
STATE OF WASHINGTON.
TO THE SUPREME COURT OF THE
TERRITORY OF WASHINGTON.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

REUBEN H. VOORHEES,
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McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

NORTHERN PACIFIC R. R. Co., Plaintiff in Error, *vs.* DAVID O'BRIEN, Defendant in Error.	No. 65.

Error to the Supreme Court of the State of Washington, as Successor to the Supreme Court of the Territory of Washington.

Brief for Defendant in Error on Motion to Dismiss Writ of Error.

It is requested that this Brief be considered as a substitute for that filed in the October term of 1890 in support of the motion to dismiss.

Statement.

This suit was originally brought by David O'Brien, defendant in error, in the Fourth District Court of the Territory of Washington, against the Northern Pacific Railroad Company, plaintiff in error, to recover damages

for personal injuries sustained through the negligence of said company, in whose employ he was, while being carried on a train on the said railroad to the place where his labor was to be performed.

The cause was tried in October, 1887, and judgment was rendered by the said District Court in favor of the plaintiff in the sum of $6,000. (R., pp. 21, 22.) The case was then taken by the defendant to the Supreme Court of the Territory on writ of error, by which court the judgment below was affirmed, and the cause was remanded to the said District Court for further proceedings in accordance with the opinion of the Territorial Supreme Court, on March 7, 1889. (R., pp. 2, 3.)

Thereupon the plaintiff in error obtained leave to file a petition for a rehearing within sixty days, and all proceedings, both in the Supreme Court and in the District Court, were stayed. (R., p. 3.)

On the 11th day of November, 1889, while the petition for a rehearing was pending, the Territory of Washington was admitted into the Union as a State, and the case passed to the State courts under the provisions of the Enabling Act of February 22, 1889. (25 U. S. Stats., 676.)

After the admission the Supreme Court of the State ordered the plaintiff in error to serve a copy of its petition on defendant in error within thirty days, and that defendant in error file his answer thereto within thirty days of such service. (R., p. 9.)

On the 8th day of March, 1890, the Supreme Court of the State, after full consideration of said petition and answer, denied said petition. (R., p. 9.)

Whereupon the plaintiff in error sued out its writ of error from this court to the State Supreme Court to review the decisions of the State Supreme Court and the Supreme Court of the Territory. (R., p. 9.)

The defendant in error asks for the dismissal of the writ of error for want of jurisdiction, because—

1. Only *final* judgments from the Territorial Supreme Court could come to this court for review.

2. The judgment rendered by the Supreme Court of the Territory was not final.

3. If the judgment of the Supreme Court of the Territory *became* final in the State court, the *final* judgment was that of the State court and there is no Federal question involved in the case.

4. The judgment did not become final in the State Supreme Court.

Points.

I.

Section 22 of the Enabling Act (25 U. S. Stats., 683) provides for the right of appeal, or writ of error, as follows:

"And from all judgments and decrees of the Supreme Court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgments shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union."

The right to the writ of error in the case at bar, had prior to the admission, was from a final judgment only.

U. S. Rev. Stats., sec. 1911.

II.

The petition for a rehearing, during its pendency, left the case open for a future definite settlement of the merits. Either party might ultimately prevail in the

Supreme Court of the Territory. Its power was not exhausted and its judgment was not final.

County of St. Clair *v.* Lovingston, 18 Wall., 628;
Parcels *v.* Johnson, 20 Wall., 653;
Bostwick *v.* Brinkerhoff, 106 U. S., 3;
Beebe *et al. v.* Russell, 19 How., 283.

The plaintiff in error could not have its petition for a rehearing in the Supreme Court of the Territory and its review in this court on writ of error at one and the same time.

The judgment of the Territorial Supreme Court could not have become final till the petition was denied.

Brockett *v.* Brockett, 2 How., 238;
City of Memphis *v.* Brown, 94 U. S., 717;
Wylie *v.* Cox, 14 How., 1.

The judgment and order made by the Territorial Supreme Court affirmed the judgment of the District Court and remanded the case to that court for further proceedings in accordance with the Territorial Supreme Court's opinion (R., pp. 2, 3.)

This order affirming and remanding is not a final judgment from which the writ lies. Judgment should have been entered by the District Court in accordance with such order.

Green *v.* Van Buskirk, 3 Wall., 448;
Reddal *v.* Bryan, 24 How., 420;
Pepper *v.* Dunlop, 5 How., 51;
Winn *v.* Jackson, 12 Wheat., 135.

The costs were not taxed in the Territorial courts, and the judgment and order of affirmance of the Territorial Supreme Court did not specify the sum for which judgment was rendered. (Rec., pp. 2, 3, 22.)

This court has held such judgment not to be final, and has dismissed a writ taken from it.

Wheeler *v.* Harris, 13 Wall., 51.

III.

In view of the want of a final determination of the merits, this case, at the time of admission, was a pending case within the meaning of section 23 of the Enabling Act, and passed to the State Supreme Court, the jurisdiction of which attached fully, with complete power in said court to render judgment for either party. It is clearly the intention in section 23 that all pending cases, in character State cases, to which the State jurisdiction attached, should be brought under the operation of the "due course of law" governing the disposal of State cases, including the law relative to the right to the writ of error in State cases. (25 U. S. Stats., 683.)

There is no federal question involved in the case at bar, and, if the judgment *became* final in the State court after the extinction of the powers of the Territorial courts, it is a final judgment by virtue of the powers of the State court, and the writ does not lie.

IV.

The judgment did not become final in the State court.

The Code of Washington (as well as section 23 of the Enabling Act) makes the county superior courts of the State the successors of the territorial district courts as to the business and records of the latter, as follows:

"Whenever the judge of the superior court of any county, elected or appointed under the provisions of this constitution, shall have qualified, the several causes then pending in the District Court of the Territory, except such causes as would have been within the exclusive jurisdiction of the United States District Court, had such court existed at the time of the commencement of such causes within such county, and the records, papers, and proceedings of said District Court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the superior court of such county."

2 Hill's Stats. and Code of Washington, p. 854, sec. 8.

The judgment, after the denial of the petition for rehearing by the State Supreme Court, should have gone to the county superior court succeeding to the duties and records of the Fourth District Court, for the further proceedings, for entry of final judgment, in accordance with the order of the Supreme Court of the Territory remanding the cause. This order passed with the case to the State court and was still operative when the petition was denied by the latter and has never been complied with. (R., p. 9.)

Green *v.* Van Buskirk, and other cases, *supra.*

The costs have not yet been taxed and the judgment affirming, whether it be considered as that of the Supreme Court of the Territory (R., pp. 2, 3,) or that of the Supreme Court of the State, (R , pp. 8, 9,) still leaves the sum for which judgment was rendered unspecified.

Wheeler *v.* Harris, *supra.*

V.

The acts of February 22, 1847 (9 U. S. Stats., 128), and February 22, 1848 (9 Stats., 212), have no application to cases which have properly passed at the time of admission within the jurisdiction of the State courts. They relate exclusively to Federal cases.

Benner *v.* Porter, 9 How., 247 ;
McNulty *v.* Balty, 10 How., 78.

The Enabling Act (25 U. S. Stats., 682, 683) is a comprehensive and complete disposal of all matters in the territorial courts at the time of admission, and was clearly intended to be and is the *only* rule applicable.

United States *v.* Tynen, 11 Wall., 88, and note.

VI.

The loss of the writ by the plaintiff in error is the result of its own voluntary act. It elected its forum in

the State. It intended to take advantage of the admission of the State to have still another court pass upon the merits of its case, one which had not already adjudged against it, and one free from the bias of a prior adverse decision, before seeking relief here. This is conclusively shown by its petition, which reads (R., pp. 139, 140):

"This petition, however, while made and filed during the time of the Territorial government, will undoubtedly be presented to and considered by the Supreme Court of the new State, now about to be organized. Such court will have plenty of time to fully consider all the questions involved in this case. None of the members of said court will be disqualified by reason of having passed upon any of the facts involved in the case in the court below.

"We think it proper to suggest that certainly no injury can be done to any one by a full consideration of this case by the full bench of the new State court, and a possible injustice arising from a hasty consideration may be averted or remedied."

The petition is an elaborate argument of the merits of the whole case. Thus plaintiff in error secured, upon a full presentation of the merits of the case, the consideration of a new and distinct tribunal from the one in which it had asked for a rehearing.

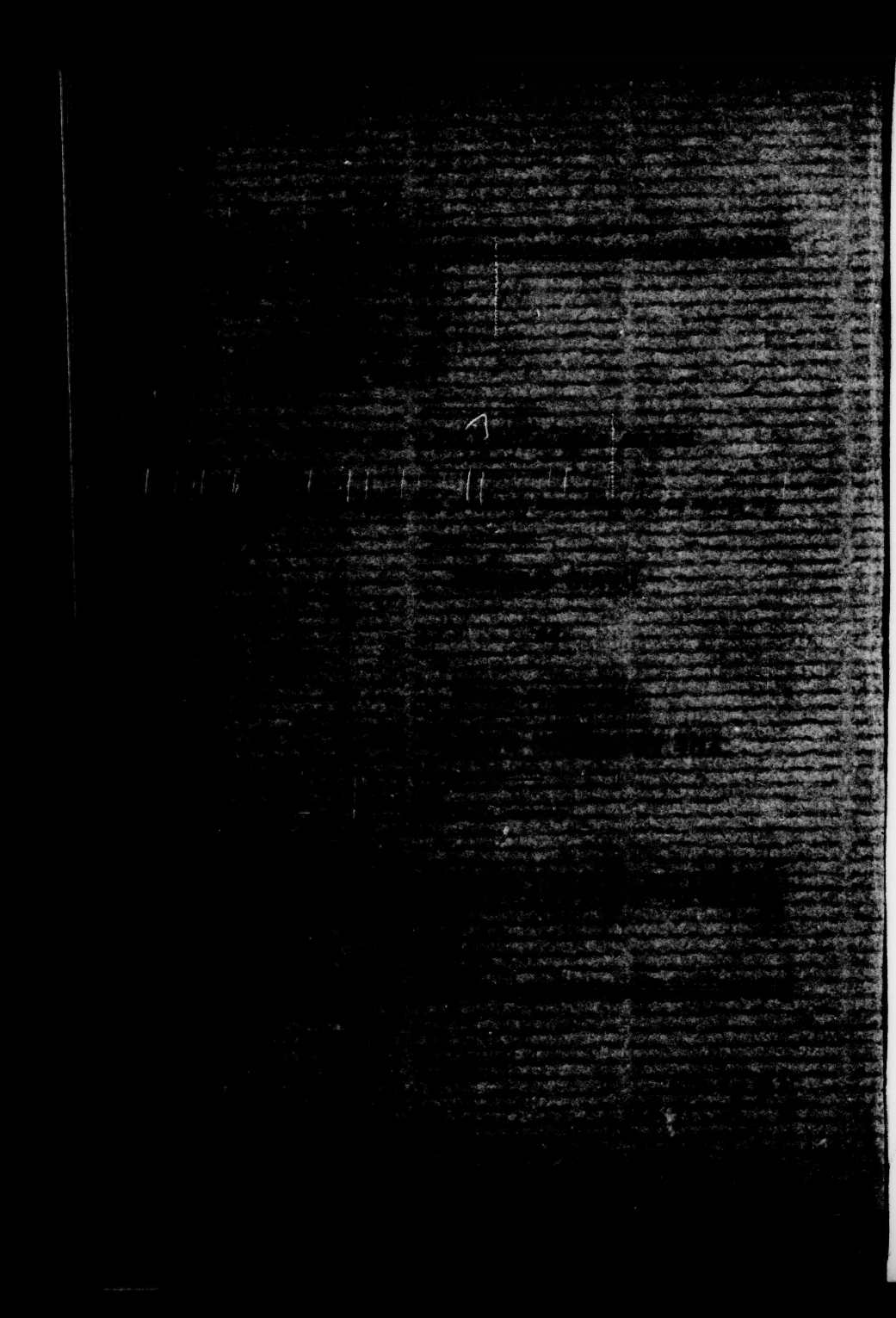
Had plaintiff in error dismissed its petition for a rehearing prior to the admission, it could have had its writ from this court.

Having chosen its course because of advantages which it hoped to derive from the political change in progress, advantages not possessed by litigants under ordinary circumstances, it should not now be heard to complain because such course was attended by certain burdens and restrictions.

Respectfully submitted,

REESE H. VOORHEES,
Of Counsel.

OCTOBER 31, 1894.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE NORTHERN PACIFIC, &c., Plaintiff in Error,

vs.

DAVID O'BRIEN.

No. 355.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

In 1891 a motion was filed by the defendant in error to dismiss this case for the want of jurisdiction, but the court postponed the consideration of the motion till the hearing of the case on regular call, and in the proper course of proceedings that will be the first matter to be presented.

We filed a response to that motion, which contains all we desire to say, or that we think needful to be said, on the question of jurisdiction, and we here present that response in full.

Response to the Motion to Dismiss.

If it be true, as stated in such motion and brief, that the Code of Washington gives effect to a motion for rehearing to suspend the decision and all proceedings, yet, if the plaintiff in error had sued out his writ of error pending the motion to rehear, this would have been construed and held as a waiver or abandonment of the motion for a rehearing; that is all, and his writ of error would have held to bring the case to a final decision.

This is the logical conclusion of *United States* v. *Hodge, 6 How., 279*, which will be again referred to hereinafter.

From the statement in the brief of the defendant in error it appears that a judgment was rendered against the plaintiff in error in the district court of Washington Territory in October, 1887. The judgment was affirmed, on appeal, by the Supreme Court of the Territory. The plaintiff in error, upon leave of the court, on the same day, by consent of O'Brien's counsel, filed a petition for rehearing. Under the Code of Washington further proceedings were suspended by the filing of such petition (sec. 482). This, however, would have been the effect of the petition, under the practice, in the absence of the provision of the Code.

Before the petition for rehearing was disposed of the Territory became a State under the provisions of the act of Congress of 22d February, 1889 (25 Stat., 676, 682–3).

The case was, pursuant to the statute, transferred to the Supreme Court of the State of Washington, where the petition for rehearing was considered. The Supreme Court of the State of Washington, by the provisions of the act of Congress (*supra*), had become the successor to the Supreme Court of the late Territory.

The petition for rehearing was answered by counsel for defendant in error pursuant to the order of the Supreme Court of the State.

The Supreme Court of the State of Washington denied the petition for rehearing, and the ruling of the court was excepted to by counsel for plaintiff in error.

The petition for rehearing having been denied, the judgment of the Supreme Court of the Territory remained the judgment of the court, as of the date of the decision and entry thereof, by the Territorial Court. It will be observed that the Supreme Court of the State of Washington regarded and treated the judgment of the Supreme Court of the Territory as the final judgment in this case.

Hence, the judgment from which the writ of error is sued out is the final judgment of the Supreme Court of the Territory of Washington, but pending, by removal under the law, in the Supreme Court in the new State. The judgment is a final decision of the Supreme Court of the Territory, and one from which a writ of error will lie to this court (R. S., 1911). The mandate will be directed, when the case is finally decided, to the Supreme Court of the State, where the case is now pending under the law.

Hunt v. *Palao et al., 4 How., 589*; *commented on and explained in Benner et al.* v. *Porter, 9 How., 235, 245, et seq.*

There is no such embarrassment here as was found in the act admitting Florida and passed upon by this court in *Benner et al.* v. *Porter, 9 How., 235.* And the legislation of Congress admitting Washington is free from the objections found in the acts admitting Wisconsin, etc., passed upon in *McNulty* v. *Batty, 10 How., 72.*

The act of Congress under which Washington is admitted as a State makes ample provision for maintaining this writ of error. It provides (1) that all cases of appeal or writ of error * * * that may hereafter lawfully be prosecuted upon any record from either of said courts (referring to the courts of the different new States mentioned in the act) may be heard and determined by said

Supreme Court of the United States; (2) and that from all judgments and decrees of the Supreme Court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States, prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union (§ 22); (3) the Supreme Court of the State is made the successor of the Territorial Supreme Court, and all the files, records, indictments, and proceedings relating to cases pending in the Territorial Supreme Court are required to be transferred to the Supreme Court of the State, to be proceeded with therein in due course of law; and no cause or proceeding was to abate by reason of the admission of the States, but, in this instance, the case was to be transferred and proceeded with in the Supreme Court of the State (§ 23).

All of these things were done; and after all it was only a change of procedure over which the parties had no control. The Supreme Court of the Territory and the Supreme Court of the new State became one and the same court for the purposes of this case. If the plaintiff in error had a right to the writ of error from the judgment of the Territorial Supreme Court under the law, the change in the procedure or in the remedy did not affect such right. (*End. Int. Stat.*, §§ *282*, *287*.) The act of Congress saved the right of the plaintiff in error to sue out the writ of error; but, if there had not been specific legislation upon the subject in the act, there is sufficient provision for the writ of error in the second section of "An act supplementary to the act entitled 'An act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases, and for other purposes.'" (*9 Stat.*, *212*, *131*; *Express Company* v. *Kountze Bros.*, *8 Wall.*, *349*.) And a year's time is given by these acts, after the admission of

a State, in which to take an appeal or sue out a writ of error.

But when and where was the final judgment rendered in this case? We say it was in the Supreme Court of the Territory, when the judgment of the District Court was affirmed. (*Freem. Judg., sec. 85.*) Without such final judgment the petition for rehearing could not have been entertained by the court. In other words, the final judgment was the foundation of the petition for rehearing. And the order made by the court in relation to such petition was interlocutory. Among the numerous orders which this court has held not to be final judgments and decrees, because they are within the sound discretion of the court, is the order refusing to grant a new trial.

> *Daswell* v. *DeLanza et al., 20 How., 29; see 7 Am. and Eng. Encyc. of Law, on final judgments and decrees of the U. S. Statutes, pp. 966 to 973, and note 2 on p. 973.*

The State courts have uniformly held that judgments or orders granting new trials are interlocutory.

> *Lawson* v. *Moore, 14 Ala., 274;*
> *Ex parte Sims, 44 ib., 248;*
> *Broyles* v. *Maddox, 43 ib., 327;*
> *White* v. *Harvey, 23 Ind., 55;*
> *House* v. *Wright, 22 ib., 383:*
> *Melcher* v. *Frendenburg, 18 ib., 180;*
> *McDonough* v. *Nicholson, 46 Mo., 35;*
> *Byers* v. *Butterfield, 33 ib., 376;*
> *Artman* v. *West Point Manf'g Co., 16 Neb., 572;*
> *Houston* v. *Starr, 12 Tex., 424;*
> *Stewart* v. *Jones, 9 ib., 469.*

This court has decided so frequently and so recently that the rulings of the courts below, upon motions for rehearing, are not reviewable here, that authorities need not be cited.

> *See, however, Danf. Dig., 764.*

So no question is presented here upon the ruling or orders of the Supreme Court of the State of Washington upon the motion for rehearing.

Nor was the filing of the petition for rehearing a waiver of the right to the writ of error.

United States v. *Hodge et al., 6 How., 279, 283.*

We think it is apparent that the judgment from which the writ of error was allowed in this case was a final judgment of the Supreme Court of the Territory of Washington, in a case arising within the limits of the new State prior to its admission, and one from which the parties thereto had the same right to prosecute a writ of error to this court that they would have had by law prior to the admission of such State into the Union; and this is the only question presented by the motion to dismiss. If the plaintiff in error is in this court from a final judgment of the Territorial court, this motion to dismiss can not prevail.

If, however, this is a writ of error from a final judgment of the Supreme Court of the State, rendered in the case and upon the proceedings transferred under the statute to that court, we still contend that the plaintiff in error is entitled to the writ of error.

25 Stat., 682–3, §§ 22, 23;
9 ib., 128, 212;
Express Co. v. *Kountze Bros., 8 Wall., 349.*

The case went out of the Territorial court to the State Supreme Court, and was there finally and definitively decided, and no quarrel is made by the defendant in error as to the regularity or lawfulness of this proceeding. To this final and definitive decision of the State court plaintiff sues out this writ of error, and defendant complains this court can not entertain jurisdiction because no Federal question is presented in the Record.

To state it differently, and to simplify it somewhat, the railroad company, under the law, had the right to make a motion for rehearing in the Territorial court, and if overruled and the case finally passed into judgment, it had the right to review that judgment here by writ of error; and under the law, pending this case in the Territorial court, Statehood having overtaken and fallen upon the Territory, the company had a right to take the case into the State court, just as it stood when the Territory was merged into a State, and have a final determination in the State court. But here defendant says the company must stop; it can not go any further. If this be true, the company is in an unfortunate and ugly predicament—no doubt of that; and this, too, brought about by the law, confessedly.

No construction of a law is to be tolerated that deprives a person of any legal right he possesses, before and at the time of the passage of such a law. The right to review here existed when the law lifted this territory up into the sisterhood of States; and the law gave the right to stop the case there and carry it entire to the Supreme Court of the State. Is it possible it could be carried there with a loss of a single right already existing? Did it not go into the State court, precisely and just as it was pending in the Territorial court, with all the rights of all the parties intact? If not, then truly this is an instance where the law is a snare and a delusion of the first class.

End. Int. Stats., §§ 285, 286, 287;

Larkin v. *Saffarans, 15 Fed. Rep., 148, 150, and cases cited;*

People v. *Tibbitts, 4 Cow., 384;*

Hunt v. *Palao et al., 4 How., 589, commented on and explained in Benner* v. *Porter, 9 How., 235, 245, et seq.;*

People v. *Livingstone, 6 Wend., 526.*

But outside of general rules of construction, do not the very acts referred to by us above, as well as by defendant in error, show this right to exist, just exactly as it does in reference to decisions in the Territorial court?

25 Stat., 682–3, ch. 180, §§ 22, 23;
9 ib., 128, ch. 17;
9 ib., 212, § 2, ch. 12;
Express Company v. *Kountze Bros., 8 Wall., 349;*
McNulty v. *Batty, 10 How., 79.*

Then it would appear this right is specifically preserved by the various enactments touching the practice and procedure in these Territorial courts, and afterwards State courts; and no Federal question is needed to give this court jurisdiction in a case like this.

If this is not so the deprivation of this right would exhibit a species of legerdemain in law-making unheard of in this country. From our Constitution down to the latest of our statutes, in all relations affecting debts, citizens in any way, Territories and States by change of status, or what not, rights as they stood, when the change occurred, are respected and upheld. And it would be a little too curious for the ordinary American intellect if this just and unquestioned principle had been ignored in matters like the one here presented.

The Merits.

O'Brien, a common laborer for the Northern Pacific Railroad Company, sued such company in a district court of Washington for injuries received on account of the negligence of the company to the amount of ten thousand dollars, and the road answered, denying any damage on account of its negligence, and especially any such damage as complained of; and alleged O'Brien was damaged, if at all, on account of his own negligence and

carelessness; and then set out a champertous contract between O'Brien and his counsel to bring the suit. (Rec., 17–20.) Another case then of *negligence* and *contributory negligence.*

A protracted trial was had, and upon evidence introduced and instructions given and instructions refused, and all proper exceptions saved, a verdict was found for O'Brien for $6,000, and judgment was entered thereon. (Rec., 22, &c.)

The road carried the case, as above seen, to the Supreme Court, where the judgment was affirmed (Rec., 8), and upon this affirmance this writ of error is prosecuted.

Abstract.

The evidence of the case, as appears from the Record, will show: That on the 21st day of April, 1888, the plaintiff in error was engaged in the construction of a portion of its line of railroad from Pasco, in Franklin County, W. T., to Tacoma, in Pierce County, W. T., across the Cascade mountains; that at that time that portion of the line extending from Cle-alum, in Kittitas County, W. T., to the summit of the Cascade mountains was in process of construction, in the hands and control of the construction department of said company, and said portion of the road had not at that time begun to be operated; that all persons employed upon said portion of said road were employés of the said construction department, and were all engaged in constructing said road and preparing it to be placed in condition for operation; that the defendant in error had been for some time previous and was at said time one of the said company's employés in said work, being employed as one of a surfacing gang, engaged in surfacing the track at various points between Cle-alum and Martin, a distance of about twenty-one miles.

That several construction trains, comprising gravel or work trains and trains hauling material for work in construction, were run upon said portion of said road then in process of construction, some running between Cle-alum and Easton, a distance of about thirteen miles; others, between Easton and Martin, a distance of about eight miles, and still others, between Cle-alum and Nelson's siding, a distance of about six miles. Some of these trains had working orders lasting for several days or hours, for work to be done within certain prescribed working limits; others had special running orders. The surfacing gang to which defendant in error belonged was, on said date, working near to Nelson's siding. Prior to that time, for several weeks, they, under charge of, and in company with, their foreman, who gave immediate direction in their work, were carried to and from their work, from and to their boarding place at Cle-alum, by a certain construction train which, in connection with its work of carrying gravel from the gravel beds to the places where they used the same in surfacing the track, was provided for that purpose.

This foreman and his gang, including defendant in error, were carried free of charge. None but employés engaged in construction work upon said road were carried or allowed to ride upon said train. They were carried out from Cle-alum in the morning, returned at noon, again carried out after dinner, and returned again at night. On the day prior to April 21, 1887, the work train, which had been carrying them, received its usual order to work that next day between Cle-alum and Nelson's siding, looking out for certain other trains working upon the same ground; that said surfacing gang, with its foreman, was on said next day carried out to their work by said train, and by it brought back at noon, the said train between morning and noon being engaged in

carrying gravel from the gravel beds to these men for use by them in their surfacing work; that about noon of the same day a similar work train, previously working between Easton and Martin, was obliged to be sent over the road between Easton and Cle-alum to reach a point where certain repairs could be made to its engine. It was sent from Easton as a wild train under special order, with direction to flag against the work train working between Cle-alum and Nelson's siding. That when about three miles from a place known as the ten-degree curve, the conductor of said train sent a brakeman forward to have the engineer proceed carefully, and for him to get off and flag around said curve. The brakeman, after getting upon the engine, and when about one-half mile from the point of said curve, caused the engineer to stop the train and let him down, when he ran ahead, out of sight around the curve, for the purpose of flagging the train. That the engineer, after the brakeman was out of sight, moved his engine down slowly until within about three or four hundred feet of the curve, where he stopped. The engine was reversing down, tender foremost, drawing the caboose, which was a box car, in which was seated the conductor with no means of communication with the engineer, except by climbing forward upon and along the boiler of the engine. The work train from Cle-alum left there about 12.45 and ran to said curve at the rate of about 18 miles an hour, pushing a flat car in front and drawing a caboose behind. This flat car was used on front of the train for the purpose of running the train into gravel beds and coupling on to other cars at imperfect sidings and places where the engine could not be used for coupling on. Between 25 and 30 of the laborers, going to work at noon, jumped upon, and rode on, this car, while the foreman and others of the men rode upon the caboose behind the engine. When the work train reached the tangent approaching the ten-de-

gree curve from the east, the flagman of the other train had just passed around the curve from the west, and said train passed him at the rate of about twelve miles an hour when he was about three or four hundred feet around the point of the curve, and passed around the curve and collided with the other train, about six or seven hundred feet from where the flagman was standing. None of the cars or engines left the track. The flat car in front of the one engine was driven into the tender of the other, and the forward trucks were thrown from the track. The defendant in error was sitting on the side of the flat car, on the outer side of the curve, with his elbows on his knees, and his head resting in his hands. He saw the other train before the collision, and had time to jump up on the flat car and go to the opposite side and return again and wait for others to jump out of his way before he was thrown off the car by force of the collision. He was picked up perfectly conscious, but suffering from a fractured clavicle, a scalp wound and general muscular soreness. He was under treatment at Cle-alum for about four weeks, and was at the hospital at Missoula, Montana, a little over a week. At the time of his last treatment at Cle-alum, the fractured clavicle had united in such a manner as not to impair the use of any of the members of his body, and so that it would not occasion him any further disability. The scalp wound had entirely healed and caused him no trouble. No ribs were broken or other bones fractured. The injuries received by him were temporary and only such as could be cured by proper treatment.

The foregoing statement of the facts in the case is believed to be reasonably deducible from the evidence to be noted hereinafter, which fully establishes the defense made by the plaintiff in error: First, that the defendant was guilty of contributory negligence, defeating his

right of recovery; Second, that the acts of those engaged in the operation of the colliding trains were the acts of his fellow-servants, for which plaintiff in error is not liable, and these are the contentions of the road without setting them out in detail as they appear in the various assignments of error.

The assignments of error in the Supreme Court of Washington (Rec., 13, *et seq.*) and in this court (Rec., 23, *et seq.*) differ in number and vary somewhat in phraseology, but they are the same in legal effect, and present substantially the same questions.

References to the Evidence of Record.

Train order—read in evidence—page 2, Bill of Exceptions.

97. EASTON, Apr. 21.

RHODES & ENGR.

Eng. 468.

Run from Easton to Cle-alum wild, flag against Hulet work train between Cle-alum and Nelson's siding and Elwin work train between Cle-alum and Easton.

C. F. R.

97 O. K. 12:10 P. M.

Rhodes. C. F. R.

13

Mooney. A. D. M.

(Rec., 31.)

Testimony of J. A. Quin, brakeman on train going west from Easton to Cle-alum, party acting as flagman.

P. 2, B. OF EXCEPS.

Q. About what time did your train, I mean about what time of day, did your train and engine No. 468 start to Cle-alum?

A. Well, sir, I should judge about 12.15 to 20, between 12.20 and 12.30; it was after 12 o'clock some minutes; I don't know exactly what time it was.

Q. You may state how you came on down to Cle-alum.

A. Well, sir, we came right along until we came to Nelson's siding. When we got there I got over on the engine to tell the engineer to run carefully, that we had to do flagging. I rode on the engine until we got to Cle-alum bridge; just going over the trestle work in a big fill between the trestle and the bridge. I told him that he should stop as soon as he got over the bridge; I wanted to go around the curve to flag; I started out on a little run and kept right on going until I got around this point of the curve and I saw this train coming. I gave the signal to stop and they passed me. (Rec., 31–2.)

P. 3, B. of Exceps.

Q. Now you may state, if you know, what is meant by flagging, by an order to flag a train?

A. I believe I know; I am supposed to be a certain distance ahead of the train.

Q. Then, if you know, you may state what that order is?

A. It is supposed to be about a distance between fifteen telegraph——

Q. [Interrupting.] About how far would that be in miles or parts of a mile?

A. It is pretty near three-quarters of a mile, I should judge.

Q. How far were you ahead of your train and engine when you got to the curve where the collision took place?

A. It was ten or twelve telegraph poles; I could not say exactly, but from the point of the curve to where I got off.

Q. Had you any means of telling about the collision, how near your engine was to you?

A. From where they struck to where I was, was a distance of about between three or four telegraph poles. I was about four telegraph poles to where they struck; whether they were there or not when I gave the signal I don't know. (Rec., 32–3.)

P. 5, B. of Exceps.

Q. About what time of day was it that the collision took place?

A. I had no watch; it was pretty near one o'clock; about 12.40 or 12.50; somewhere along there.

Q. You saw the work train pass you when you flagged against it; how far were you from it when you gave the danger signal?

A. Well, I was a little over three telegraph poles from it.

Q. That would be about what distance?

A. Well, I don't know exactly how far the telegraph poles are apart. They are generally 28 to 30 to the mile, sometimes 25. I was not quite to the fourth when I could see them.

Q. How long was the curve?

A. Something over a quarter of a mile; between a quarter and a half.

Q. At what point did the collision actually take place?

A. It did not take place on the curve at all. It took place on the straight track, just after you got around the curve.

Q. How far from the point of the curve?

A. It is a short ways, may be 100 or 150 feet. (Rec., 36.)

P. 6, B. of Exceps.

Q. Now, what rate of speed was this train going when it passed you?

A. I could not say how fast she was going, not in justice to myself, not under oath to tell the truth and be sure of it.

Q. You could not state about how fast she was going?

A. No, I could not; I was on the outside of the curve. The train looks to be going very fast when you are on the outside of a curve. (Rec., *sup.*)

P. 10, B. of Exceps.

Q. What distance did you say telegraph poles are apart?

A. Some roads they are 25 to the mile, some 28, and some 30.

Q. What distance are they apart on this road up there?

A. I could not say, but I think they are about 28.

Q. You say that when you were standing at the side of the track you were in a position when the work train would appear to be running faster than it did?

A. It would be that way, I should think.

Q. Where was it you went forward to the engine; where was the train when you first went forward to the engine?

A. At Nelson.

Q. How far was that from the curve?

A. O, it must be three miles—about three miles, I guess.

Q. By whose orders did you go on the engine?

A. By Mr. Rhodes, the conductor.

Q. How far were you from the point of the curve when you got these orders?

A. About three miles. (Rec., 41–3.)

P. 11, B. of Exceps.

Q. You say the work train was between three and four telegraph poles away from you when you signaled them?

A. Yes, sir.

Q. You mean when you signaled them or first saw them?

A. When I gave the signal. Just before that they were coming around a little log house. I knew there was no use to give a signal when they could not see me.

Q. Then you did see them before you gave the signal?

A. Just a second, kind of flashed by the house; there is a tree growing there and some stuff. The side of the train was to me, I know.

Q. How far were you to eastward of the end of the curve at the time you saw them?

A. How far was I?

Q. Yes, sir.

A. The curve is a considerable ways from where I was.

Q. The end of the curve which you had passed in going to where you gave the signal?

A. From the west end of the curve?

Q. The west point of the curve.

A. Oh! I was about three to four hundred feet; might not be that much.

Q. Do you mean to say that you flagged by telegraph poles?

A. Well, I don't know exactly the right distance, but we only had a light train; if we had a heavy train or something of that kind—if we had come down with a heavy train, expecting to meet another train, we would have gone further, but as we came along light we did not think it required to be so far; I did not think so.

Q. You did not think so?

A. No, sir; I got off at what we considered a proper distance for any train to stop.

Q. You would consider it a proper distance for any train to stop?

A. A train of that kind; yes.

Q. The fact of the matter is, you had an engine, tender, and caboose?

A. That was all we had—engine, tender, and caboose; a box car we used for a caboose.

Q. Now, at the time of the collision, neither your engine, tender, or caboose, or the flat car or engine or caboose of the other train left the track?

A. No, sir; there was nothing left the track, not that I saw. (Rec., 43.)

P. 12, B. of Exceps.

Q. From the place where you gave the first signal to the point of collision, was how far?

A. Well, the distance between a little over three telegraph poles. (Rec., *sup.*)

Testimony of W. H. Bowman.

P. 13 of Bill of Exceps.

Q. Where were you about the 21st day of last April?

A. I was at Cle-alum, working for the railroad company.

Q. What were you doing? What were you engaged in?

A. Surfacing track; construction work.

Q. Under what foreman?

A. Abercrombie.

Q. Do you know the plaintiff, Mr. O'Brien?

A. Yes, sir.

Q. What was he doing then?

A. He was working on the same kind of work along with me.

Q. How long had you been engaged in surfacing along that road above Cle-alum?

A. I had been working for the company off and on for a couple of months.

Q. What I want to know is, how long had this surfacing been going on above Cle-alum?

A. Well, as far as I can remember, it began about that month.

Q. How was this foreman Abercrombie's party taken out from Cle-alum to their work?

A. About six miles.

Q. How did he take them?

A. Took them on the train, Hulett's train generally.

Q. State if he would take them out in the morning after breakfast?

A. Yes, take them out in the morning, bring them to dinner, and take them back after dinner and bring them in in the evening.

Q. You may state what time they came to dinner usually; what time of day?

A. We had dinner about 12 o'clock; sometimes all the way from eight to ten, or fifteen minutes after.

Q. That you left to go to your work?

A. No; we left to go to work about 12.45.

Q. Your work, you say, was about six miles away at that time?

A. As well as I can remember; yes, sir.

Q. Had this train, this work train, been running regularly for some weeks?

A. Yes, sir.

Q. Now you may state, on the 21st of April, about what time you left Cle-alum after dinner, after your noon meal?

A. Well, I did not notice that day exactly what time we did start; it was about 12.45. I should judge.

Q. You may state who was on the train?

A. It would be impossible for me to call the names of all.

Q. I mean the officers; under whose charge?

A. Hulett was conductor and Swain was engineer; the brakeman, I did not know his name.

Q. Now the plaintiff was on that train?

A. Yes, sir.

Q. Under the direction of the foreman, Abercrombie?

A. Yes, sir.

Q. Was he on the train?

A. Yes, sir; he was in the caboose; I suppose he was.

Q. Where were you on the train?

A. I was riding on the platform of the caboose. (Rec., 44 *et seq.*)

P. 14, B. of Exceps.

Q. State about where the collision occurred.

A. I should judge about two and a half miles above Cle-alum. (Rec., 46.)

Testimony of David O'Brien, Plaintiff.

P. 26, B. of Exceps.

Q. You may state where you were on the 21st of last April.

A. I was at Cle-alum, in Kittitas County.

Q. What were you doing there?

A. I was working for the Northern Pacific Railroad Company, surfacing track.

Q. Where was the surfacing going on?

A. A little above, a little over five miles west of Cle-alum at the time.

Q. How long had you been engaged in this work?

A. Sometime in March; probably from the 24th of March; sometime along there.

Q. Who were you working under?

A. A Mr. James Abercrombie.

Q. Was he foreman?

A. Yes, sir.

Q. Now you may state how you went to and from your work?

A. We returned with the work train.

Q. Where did you return to?

A. To Cle-alum, where we were boarding.

Q. Well, how often would you be taken to your work from Cle-alum on this train?

A. Taken out in the morning, home at noon to dinner, and out to work after dinner and home again in the evening.

Q. Now, how long had this been the usual way of going to work and coming from work?

A. Well, about three weeks or more, probably; from the time we got far enough away that it would be inconvenient to walk to dinner.

Q. Now, state if there was a collision on the road on the 21st of April.

A. Yes, sir.

Q. Where did that occur?

A. About two and one-half miles west of Cle-alum. (Rec., 59–60.)

P. 27, B. of Exceps.

Q. Where were you riding on the train?

A. I was riding on the flat car in front of the engine.

Q. State your position on this car; where were you sitting?

A. I was sitting on the south side of the car, next the river, and there within one or two of the back end of the car, next to the engine on the side of the car. (Rec., 61.)

P. 31, B. of Exceps.

Q. Now, when you were on that flat car, just before the accident, you said that you saw the tender of the engine before you struck?

A. The tender.

Q. The tender of the engine that collided with your train; you saw it before you struck?

A. Yes, sir.

Q. And that, after seeing it, you had time to run to the side of the car next the bluff and then cross back again to the other side?

A. I jumped upon the car upon my feet; I was kind of leaning on my elbow on the car; I jumped to my feet and looked over on the other side to see what chances would be to get off on that side.

Q. What did you do after you saw that?

A. I just moved around the other way, and as soon as these other men got out of the way I started to jump. Just about that time that car struck and threw me on my head on the rocks. (Rec., 67–8.)

Testimony of Gardner, Fireman on the Train Going West From Easton.

P. 36, B. of Exceps.

Q. Now, your engine had stopped before the collision took place, and you were down off the engine?

A. It was stopped when I got off.

Q. Was that some little time before the other engine came around?

A. It was not very long.

Q. You had time to get down off the engine?

A. Yes, sir; I had time to get off. (Rec., 73.)

Rules Read in Evidence.

P. 47, B. of Exceps.

Rule No. 47, as follows:

"Flagging against trains means a man ahead of the train three-fourths of a mile with danger signals. Those giving signals must locate themselves so as to be plainly seen, and make them in such a manner as to be readily understood."

Rule No. 96, as follows:

"When a flagman is sent out to flag an approaching train he must, if possible, avoid stopping on a curve, or behind any obstruction, endeavoring to pass beyond the same, should such exist, and reach a position where he can be clearly seen from the approaching train for at

least one-fourth of a mile. The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs from want of any precaution that could have been taken."

Rule No. 99, as follows:

"Trains are to be run under the direction of the conductor, except when such directions conflict with these rules, or involve risk or hazard, in which case the engineer will be held equally responsible." (Rec., 86.)

Testimony of H. S. Huson.

P. 46, B. of Exceps.

Q. State what, if any, position you hold on the Northern Pacific Railroad?

A. Principal assistant engineer in charge of construction.

Q. State if you held that position last April?

A. I did not.

Q. What was your position on the 21st of last April?

A. I was engineer of the Cascade Division, Pasco to Tacoma.

Q. Then the regulations prescribed in that book of rules (handing book to witness) were in force, were they?

A. In so far as they related to construction; you understand that that book was gotten up for transportation. Construction is not transportation. In so far as the management of trains on construction correspond with the management of trains in transportation of freight and passengers in so far are they adopted and were they adopted by me.

Q. Look at 47 in that book and state whether that was in force at that time?

A. That was in force so far as it was practicable. Rules on construction can not so readily be carried out

as those upon operation where every facility is afforded. Every sort of sign and device is perfected upon operation. Upon construction these signs and devices are not perfected; they are in process of construction and can not be had at that state of perfection which they are implied in that book of rules. Therefore the strict construction of that book of rules applied to the operation of construction trains can not be had. (Rec., 85–'6.)

P. 47, B. of Exceps.

I say they are used with the modification that I made in my answer as far as practicable, as far as the appliances we had to use them.

Q. The first sentence in rule 47 means trains that are in operation?

A. It means that under certain conditions the flagman should be three-fourths of a mile ahead of the train.

Q. (After reading rules 47, 96, and 99 to witness.)

A. I could not swear whether these were in force or not. These are simply rules that are laid down by the superintendent or person in charge of the work.

Q. Do you understand that order? (Train order handed witness.)

A. Yes, sir; I understand it.

Q. What did that order to flag against the work train mean?

A. It meant simply to run to Cle-alum, and that they were liable to find Hulett somewhere between Cle-alum and Nelson's siding, and that they should flag against him on these limits.

Q. What does a look-out order mean?

A. Well, my understanding of a look-out order is that it does not mean much of anything, except that it posts the other party; it is merely a warning.

Q. To whom is a look-out order generally given when trains are in motion?

A. It is given to the party who has a right to the road, and it is given or not given as the train dispatcher may think best—as he may feel inclined.

Q. Now, what do the rules require with reference to the speed of trains?

A. The rule in reference to trains is eighteen miles an hour; that was the rule at that time. (Rec., 85–7.)

P. 48, B. OF EXCEPS.

Q. Now, is there any duty that the look-out order imposes with relation to the speed of trains in coming to bad places or curves or dangers?

A. I do not understand that there is; that is my judgment.

Q. Between what points did construction extend during the month of April?

A. The construction trains were running at that time between Cle-alum and some point on the switchback. Some variable point as the work was pushed further on the switchback.

Q. As a matter of fact, can you in matters of construction adhere strictly to this book of rules?

A. No, sir; we can not.

Q. Are there not orders given in connection with construction and the running of trains that are not necessary in the running of the road?

A. Yes, sir.

Q. That comes from the necessity of construction work?

A. Yes, sir.

Q. This order that has been shown you—what is that called?

A. That is called a special order—a running order.

Q. Now, you have orders on construction that are called work orders?

A. Yes, sir; these work orders may last for any number of days or hours.

Q. They may cover quite a number of trips, may they not?

A. They may; they may last a whole week.

Q. Is it possible under such orders to comply with this book of rules?

A. No, sir; not to comply strictly. The book of rules is held up as a sort of standard to work to as far as circumstances will permit. (Rec., 88.)

P. 49, B. of Exceps.

Q. The train orders are given to both the conductor and engineer, are they not?

A. Yes, sir.

Q. Can an engineer leave a station, either an operator's station or train dispatcher's station, with his train before he gets the order, even if the conductor has one?

A. No; he has to have an order.

Q. Both have to have orders?

A. The orders are given together.

Q. They are given to the engineer and conductor?

A. It would be impossible for a conductor to get an order without the engineer.

Q. What time did they begin to operate trains on the road between Cle-alum and Easton or Martin?

A. The first operation was July 4, the first operation train went over it.

Q. All the trains that went over that, previous to that time, were construction trains carrying material?

A. Yes, sir. (Rec., 88 9.)

P. 50, B. of Exceps.

Q. State if the plaintiff in this case was employed by you, or your company, for any purpose under your direction.

A. He was employed as a laborer in the surfacing gang.

Q. Between what points?

Q. At that time we were working between Cle-alum and Nelson's siding. I suppose they were in reality working between Cle-alum and Martin, subject to orders to go to any point between the places.

Q. How were they carried to and from their work?

A. Upon construction trains.

Q. Were they charged any fare for their transportation?

A. They were not.

Q. This train that carried them out was provided for that purpose?

A. Yes.

Q. State why the flat car was pushed out on this occasion?

A. A car is frequently placed in front of the engine to be used in coupling on the other cars.

Q. Where would it be necessary to couple on to other cars?

A. In reaching into gravel beds to pull gravel out; the engine could not be taken in and coupled, and you can not always have your cars coupled on behind your engine; you must take your cars as you are able to get hold of them, and for that purpose the car is frequently placed in front of the engine.

Q. Always carry a caboose on the engine taking men to work?

A. Yes; and frequently at imperfect sidings it is necessary to have cars in front to run and take the cars out.

Q. Was there room in the caboose attached to this engine for the men to ride in?

A. I know nothing of this particular case except that a caboose is furnished where men can ride in a caboose. It is usual to furnish a car in addition.

Q. What kind of a car?

A. A box car.

Q. Do you know of any orders by the company prohibiting the men from riding to work in a caboose?

A. Of my own knowledge I could not say. I would say that it is sort of a common law among railroad men and employés that they are not allowed to ride upon open cars.

Q. I mean about riding in a caboose?

A. They are to ride either in a caboose or box car. (Rec., 90.)

P. 51, B. of Exceps.

Q. How long had this piece of road between Cle-alum and Easton been in process of construction before the time of this accident in April?

A. Well, I could not state definitely without reference to the records; probably from the November previous, in that vicinity.

Q. What was the condition of the track and road around these curves at the time of the accident?

A. It was in good condition; it had been just put up and was in nearly as perfect condition as a track often gets.

Q. Who employed and paid these laborers that were doing the surfacing?

A. I might say that I did; I had other agents under me.

Q. Their time all came to you?

A. Yes; their time came to me for approval.

Q. Were the conductors and engineers and brakemen on these trains employed by you?

A. The train was supposed to contain no one but employés.

Q. In connection with that work?

A. In connection with the particular work of construction.

Q. Now this train, with Hulett as conductor and Swaim as engineer, what work were they engaged in doing?

A. That train on that particular day was haul ng gravel and also carrying the men to and from work.

Q. Had been engaged at that some time?

A. That had been their regular work for some time.

Q. This other train that was coming down from Easton was also working with them in construction?

A. Yes, sir. (Rec., 91.)

P. 52, B. OF EXCEPS.

Q. Have you ever, in any of your construction work, found that rules applicable to operation apply to construction closely could be made to apply to construction in all particulars?

A. No, not in all particulars. I find that, as a general thing, that in operating one road that it is my custom to adopt the rules of that road, because the men employed by me are mostly trained upon that road. The men that I employ upon my construction work are likely to be men who are familiar with the construction of that road. The rules are adopted as a sort of morale, simply to make the men as observant and careful as possible.

Q. Are construction trains confined to any particular speed in running?

A. They are, as far as practicable.

Q. Well, is it always practicable to confine them to any particular speed?

A. It is not practicable to confine any train to any particular speed. The fact of it is, it is almost a physical impossibility to find how fast the train is running; that is, by observations, you can tell the speed a train will exceed, the speed laid down in the schedule. A train is given an order to run fourteen miles an hour from

Ellensburgh to Cle-alum. That means that the total time between these points shall come up to that. There may be portions of the road that will travel seven or eight miles an hour; other portions of it may travel enough faster than fourteen miles an hour to keep in up within that limit. (Rec., 92.)

P. 54 of Bill of Exceps.

Q. The speed of your trains was limited by the kind of track they had to run over, was it not?

A. That was it exactly.

Q. These were the orders, were they not?

A. It was implied orders.

Q. The men who worked on this Cascade division—their time was returned to you?

A. Yes, sir; their time was returned to me, and I put it in proper form. The checks were drawn in St. Paul, and drawn subject to my order.

Q. They did not work under your personal supervision, did they?

A. Not all the time, of course.

Q. You had other men who were bosses of these gangs, did you?

A. Yes, sir.

Q. Who was the foreman of this particular work?

A. James Abercrombie.

Q. He was employed by you and worked there for that purpose?

A. Yes, sir. (Rec., 93–4.)

P. 56, B. of Exceps.

Q. What kind of a curve is that where the collision occurred?

A. It was a ten-degree curve—that is, it is deflected from a straight line ten degrees in a hundred feet. There is but one curve in that vicinity; it is a simple

curve, bending in one direction with a straight line extending from the curve in both instances nearly half a mile or half a mile each way from the curve. There is no reverse curve there; it was a simple curve, and but one. (Rec., 96.)

P. 57, B. of Exceps.

Q. Do you know the orders under which the Hulett train was running?

A. Yes, sir.

Q. What were they?

A. Their orders were that day to work between Cle-alum and Easton. I say I know the orders; I know the general orders under which they were working; I could not give the exact orders between those points. They had the right of way.

Q. They had such orders for some time?

A. Yes, sir.

Q. As they had on that day, regular for some time?

A. Yes, sir. (Rec., 97.)

Testimony of Clay Swaim, Engineer of Engine, Work Train Hauling Men to Work.

P. 58, B. of Exceps.

Q. Do you know a man named Tim Bowman?

A. Yes, I know him.

Q. Did you see him in the morning when you started away, and where was he when you saw him?

A. He was coming out and starting to get on the flat car. I hallooed to him and told him to go back into the caboose.

Q. What was the occasion of your telling him to go back in the caboose?

A. I saw that he was a little drunk, and staggering, and I thought he might roll off the flat car. He got on the caboose. (Rec., 98.)

P. 59, B. of Exceps.

Q. He went back there by your orders?

A. Yes; I directed him to go back there.

Q. The men rode in the caboose just as freely as anywhere else?

A. I never heard anything different from that.

Q. Do you know of any orders prohibiting them from riding in the caboose?

A. No, sir; I do not.

Q. What time did you leave Cle-alum on the day of the collision?

A. 12.47.

Q. What time did the collision occur?

A. It was just exactly 1 o'clock. (Rec., 98–9.)

P. 60, B. of Exceps.

Q. What orders were you running under?

A. Work orders.

Q. State what they were.

A. Working between Cle-alum and Nelson.

Q. Get any orders with reference to any other train?

A. No, sir; we had orders to look out; had look-out orders. (Rec., 99–100.)

P. 62, B. of Exceps.

Q. From what you know, your experience, and from the facts, what can you say as to the speed you were running when you struck that curve on the 21st of April?

A. I think about 18 miles an hour.

Q. What rate of speed were you runing when you came to the point of the curve?

A. Well, I think about 12 miles an hour. (Rec., 102.)

Testimony of O. C. Hulett, Conductor of Train Hauling Men to Work.

P. 64, B. of Exceps.

Q. What particular runs were you making?

A. I was leaving Cle-alum in the morning and taking the white men out on the surfacing work, and coming back and taking the Chinamen out to handle gravel. At noon, bringing the white men and taking them out to work, and bringing them in at night. Afternoons I handled the Chinamen the same as I did before with the gravel.

Q. You saw Timm Bowman in the afternoon when you were going out?

A. Yes, sir.

Q. What part of the train did he get on?

A. The forward steps of the caboose.

Q. Were the other workmen in the caboose?

A. Yes, sir.

Q. Was there any objection made by you, while you were running the train, to laborers riding in the caboose?

A. I don't know that I ever made any one get out of the caboose, but I have made them get off the back platform. They bothered me with the brakes, so that we could not handle the brakes on the back platform, and I used to make them get off there. (Rec., 103–4.)

P. 65, B. of Exceps.

Q. Why was the flat car put in front of the engine?

A. I had a gravel bed arranged in such a way that I could not pull the cars that I had put in there if the gravel bed was full. I set in twelve or fifteen cars in the gravel bed. The cars I had ahead of me unloaded; and the men rushed upon the head car, and I took them down with me. (Rec., 104.)

Testimony of Dr. Beebe, Physician under whose Treatment Plaintiff Remained for about One Month after the Accident.

P. 80, B. of Exceps.

Q. How long have you known plaintiff, and when did you first see him?

A. I first saw him at the Reed House, Cle-alum, on the evening of April 21, this year.

Q. Did you examine him professionally at that time?

A. I did casually, but I did not give him a careful examination on the 21st, but on the 22d.

Q. State when you examined him after that, and how frequently?

A. I saw him on the day of the 21st, and every day thereafter, I think, until the 27th, when I visited him every day; I think it was the 27th.

Q. How often did you attend him after that?

A. Well, I attended him from that every second day, perhaps, for an entire week or so, and then after that, I think, he was placed in the hands of Dr. Whelock, of Cle-alum, and I visited him when I visited other patients at that place.

Q. Every second or third day?

A. About that, I should judge—every two or three days.

Q. Well, how long did that continue?

A. I continued to make regular visits to Cle-alum to see these patients until the middle of May.

Q. Well, how long were you in attendance upon them, taking it altogether?

A. I think, perhaps, about four weeks all the time.

Q. Now, you may state what you know of his injuries; state what they consisted of and what they were?

A. Well, his injuries were a fracture of the clavicle, or what is known as the collar-bone, and he had scalp wound, and there was a considerable degree of muscular soreness.

Q. What was the nature of this clavicle wound?

A. Well, it was a fracture, a complete fracture of the clavicle near the division of the outer and middle third, as near as I can give it.

Q. What were the wounds on the head?

A. The wounds on the head consisted of simple scalp or flesh wounds.

Q. What other wounds did you notice about his body other than these you mentioned?

A. I noticed no other wounds, except, perhaps, some slight bruises.

Q. Did you make an examination of the portion in and about the ribs?

A. Yes, sir; I examined his body very thoroughly on several occasions. (Rec., 120–1.)

P. 81 OF B. OF EXCEPS.

Q. Did you find any broken ribs?

A. No, sir.

Q. Were there any broken ribs?

A. I didn't discover any; it is my judgment that there were none.

Q. Did you find any indications of broken bones other than those you mentioned?

A. No, sir.

Q. In the region of the ribs?

A. No, sir.

Q. How was the union of this collar bone at the time he left your treatment?

A. There was a good union, or as good as we expect; there was some little deformity which, as a rule, will

exist; some little deformity on account of the patient's not being able to be placed in a perfect position, but the union was good.

Q. Considering the union of that clavicle bone, the fracture of that clavicle bone, at the time Mr. O'Brien left your treatment and the condition it was in at that time, what would you say as to its interference with the use of the arm in any way?

A. It would not permanently affect him; having held the shoulder still for a length of time will always impair the use of the arm for a certain time, but that is not permanent.

Q. That is, not for any great length of time?

A. No, sir.

Q. Now, what is the effect of the non-use of the arm?

A. Well, the effect to the arm is that it will become anchylosed, it stiffens and the use is impaired.

Q. If it is used a little from day to day, that will pass away, will it not?

A. Yes, sir.

Q. What is the appearance of the deformity ordinarily in clavicle fractures?

A. Fractures of the clavicle are in a great majority of instances broken obliquely across, so that there is an overlapping of the bones when they come together; there is a callus thrown out from the bone, but not being able to hold it in an exact position during the treatment, this would always be felt in passing the finger over it, so that you will always feel the ridge in the clavicle.

Q. Will that pass away in time?

A. No, sir; there is always left some deformity in its place in the collar bone.

Q. Can that cause any disability in the use?

A. No, sir; none whatever.

Q. Is there any fracture of the skull?

A. No, sir.

Q. Did you see any wound in the forehead?

A. Well, nothing more than there might have been an abrasion, but there was no flesh wound to any extent; it was an abrasion of the skin. (Rec., 121–2.)

P. 88, B. of Exceps.

Q. Did Mr. O'Brien describe to you any of the sensations, such as blood rushing to the head, as has been specified in the questions asked you?

A. The only suffering Mr. O'Brien complained of was confined to his body and his shoulder, principally to his shoulder, and more especially when he attempted to lie perfectly still, and breathe, but when he attempted to change his position any way he complained of great pain.

Q. Didn't he walk around considerable after he got up, out around Cle-alum?

A. I saw him on a number of occasions when he walked around the house.

Q. What, in your judgment, caused these pains he complained of?

A. I think the pains came from muscular soreness; that was my diagnosis of it at the time, that it came from muscular, the same that came from the inner side. The pain in the region of the clavicle came as a natural result of the fracture of the bone from the pressure.

Q. I will ask you, doctor, if Mr. O'Brien was complaining of any particular pain at the time of your treatment—at the time he left Cle-alum, or when you saw him last at Cle-alum?

A. No, sir; he did not complain of any pains. He came to Ellensburgh, and I think he stayed about two nights with me in Ellensburgh before going on to Missoula. His complaint then, while he seemed to be pleased to think that he was recovering, he said he felt very good, but he complained of a stiffness of the shoulders, but on examination I found that he could raise his hand on top of his

head. On a number of occasions I assured him, as he will remember, that in my judgment it would be a question of time that his arm would be restored to usefulness. I based my opinion on the improvement that had been made from the time he was injured to that time.

Q. You saw no evidence of these sensations that have been spoken of in the questions asked by Reavis?

A. I saw no evidence at the time he left me of any of the conditions that were mentioned in that article read.

Q. Did he describe any of the sensations in this hypothetical question?

A. No, sir; he didn't complain while he was at Cle-alum. When he first got out of bed, when I first saw him, he complained of being dizzy; but that will follow in any case where any one has been in a recumbent position after resuming the upright, because it brings about a change of the circulation; blood will naturally be taken from the brain. (Rec., 130–1.)

Testimony of Dr. Morrison, Physician who Made Examination of Plaintiff Shortly After the Accident.

P. 74, B. of Exceps.

Q. State whether you made an examination of plaintiff in any way at or about the time of the accident or shortly thereafter?

A. I did examine him once, with all the other patients at Cle-alum who were injured.

Q. How often did you examine him?

A. I made two examinations of him.

Q. State, from the examinations you have made of him and his condition, what were his injuries.

A. The two examinations I made of him were as I was passing round among the wounded to see who needed the

first or most attention, and I found him with some scalp wounds, and he complained of some soreness about the shoulders and chest.

Q. Well, when did you make another examination?

A. After they had all been attended to I went back with Dr. Harris and examined him very carefully, as he was suffering a good deal of pain, to see the full extent of his injuries, and discovered a fracture of the clavicle. There was no overlapping of the fragments, no great amount of displacement, and it was a difficult fracture to detect. I noticed at the time some slight abrasions on the left breast below the nipple; these were the only marks upon him other than his scalp wounds. They were dressed at the time of my second examination. I didn't pay very much attention to them at the time of my first examination. I examined his scalp wounds, ascertaining that there was no fracture of the skull before they were dressed.

Q. No fractures of the skull?

A. No fractures of the skull.

Q. Did you notice any bruises on the forehead?

A. Yes; there were some slight bruises on the forehead, some abrasions of the skin only, a little cut on the forehead; but there were so many other injuries of greater character that we passed over the smaller ones.

Q. Did you make a complete examination of Mr. O'Brien, all parts of his body?

A. All that was exposed, about his waist, chest, and arms and neck, I examined carefully.

Q. What did you notice as to the ribs?

A. I discovered no ribs broken at all.

Q. Did you make an examination?

A. Yes; I examined very carefully his chest and also his back. (Rec., 115–16.)

P. 75, B. of Exceps.

Q. What would you say as to the character of these injuries resulting in any disability?

A. From the injuries that were visible at the time, external injuries, there was nothing that would produce any permanent disability. (Rec., 116.)

Testimony of Dr. Mills, Physician who Examined Plaintiff Shortly after the Accident.

P. 67, B. of Exceps.

Q. State if you know the plaintiff, Mr. O'Brien?

A. I saw Mr. O'Brien on the 26th April, at Cle-alum, at Reed's hotel; I examined his wounds at that time.

Q. From your examination you made at that time, state what his injuries were?

A. He had, to the best of my recollection, two scalp wounds, one probably two inches long, and the other an inch, and also a number of contusions on the body and a fracture of the clavicle.

Q. How many examinations did you make of him?

A. I think only one.

Q. How thorough was that examination?

A. I gave him a complete examination, very thorough, all portions of the body, from head to foot.

Q. Well, now, state what you observed as to this clavicle.

A. He had a simple fracture of the clavicle near the scapula end; there had been some displacement, but it had disappeared, and it was very perfectly adjusted.

Q. How about the ribs?

A. The ribs were sound.

Q. No fracture?

A. No, sir.

Q. Did you make any examination of his chest later on?

A. I did.

Q. What did you find?

A. I found some contusion of the muscles and skin.

Q. State what, in your judgment, would be the effect of these contusions?

A. The contusions would temporarily disable him, but I saw no contusions but what he would recover from speedily.

Q. From your examination can you form an opinion as to the permanency of these injuries?

A. I think he would make a complete recovery; that was my opinion at the time.

Q. Did you see him after that?

A. I met him one time.

Q. Where?

A. In Missoula.

Q. What was his apparent condition?

A. Well, he was very comfortable, apparently; I met him on the street.

Q. How did he seem to move about?

A. He moved very well at that time; he was walking when I met him; he stopped and conversed and said he felt sore; he said he was getting strong.

Q. Did he say anything about his collar-bone at that time?

A. He said that he felt quite strong, but was quite sore.

Q. Did he say anything about the fracture having united?

A. He said that it had united and was quite strong.

Q. When was that?

A. That was in May.

Q. Now, these wounds on the forehead, what did they amount to?

A. There was a small scalp wound, incisions of the scalp.

Q. What effect would that have on his physical condition?

A. I think that probably would unite in four or five days; it was well on the way towards uniting when I saw him, doing nicely.

Q. What is the usual result of a fracture of a clavicle?

A. Well, there is no disability, as a rule, that follows a fracture of the clavicle, except temporarily. (Rec., 106–8.)

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Q. Did you examine plaintiff's ribs as well as other portions of the body?

A. Yes, sir.

Q. Found no fractures?

A. I found no fractures.

Q. Did you examine to see if there were any projecting bones in the ribs?

A. I examined the chest very thoroughly and I found no displacement of the bones and no fractures. I strongly suspected there had been a fracture, because there had been a fracture of the clavicle, which caused me to make a very careful and full examination, and I failed to find any displacement or fracture. (Rec., 108.)

With this somewhat extended notice of the evidence, which could not be cut down without leaving the court unacquainted with the facts upon which the case really turns, we will now proceed to discuss the—

Legal Points Involved.

I.

The court erred in permitting answers to be made to the several questions referred to in the 1st, 2d, 3d, 8th, 9th, and 10th assignments of error. All these questions have relation to the defects in the engine which was reversing from Easton to Cle-alum. They are to be found

in the testimony of brakeman Quinn and fireman Gardner, and are as follows: "You may state if there was any defect about the engine." "What was the difference between her working then and the way she generally worked?" "How long would it take to start her one way or the other?" "What for?" (referring to the place where the engine was being taken). "Now, what repairs?" (referring to repairs on the engine). "Now, how much was this engine disabled by the springing of the eccentric blade?" The course of inquiry immediately preceding and following these questions, as well as the nature of the questions themselves, clearly show that the purpose of asking them was to leave the impression on the minds of the jurymen that the company was itself negligent in allowing a defective engine to be taken over the road. The condition of the engine was sought to be made, not merely an element, but of itself a distinct class of negligence, constituting a basis of recovery. The questions themselves, and the testimony which the court admitted by allowing them, were immaterial to the issue made by the pleadings. If the court permitted the questions merely for the purpose of enabling the plaintiff to show more in detail the exact nature of the accident and collision, and all the surrounding circumstances bearing any relation to the same, it should have restricted the inquiry to this purpose by proper instructions, which would have removed from the jury any impression concerning the defect in the engine as a ground of recovery in the case; instead of this, however, the court refused instructions asked by defendant and designed for this purpose. These instructions were to the effect that the plaintiff could not recover for any negligence other than that alleged in his complaint, and that the allegations in plaintiff's complaint are not sufficient to cover any negligence of defendant except negligence in the operation of its trains. These instructions

are referred to in Nos. 25 and 26 of the assignments of errors. (Rec., 28.) Whatever is the real ground of complaint ought to be distinctly stated in the complaint, and only that ground of negligence which is alleged can be proven. As is well said in a case where similar evidence was held to be inadmissible, the effect of this evidence was to raise a false issue. The defendant was not on trial for general negligence, nor was it liable for any acts of negligence except those which caused injury to the plaintiff.

It has been held that where plaintiff charged negligence in running the cars, evidence could not be admitted of a defective sand box on the engine, or a defective frog on the track.

Waldhir v. *Hannibal, etc., 2 Am. and Eng. R. R. Cases, 146* (*71 Mo. Rep., 514*);

Edens v. *Hannibal, etc., 5 Am. and Eng. R. R. Cases, 459*;

C. C. & I. C. R. W. Co. v. *Troesch, 68 Ill., 545*;

Morse v. *Minneapolis, etc., 11 Am. and Eng. R. R. Cases, 168* (*Minnesota case*);

Batterson v. *Chicago, etc., 8 Am. and Eng. R. R. Cases, 123* (*Michigan case*).

II.

The court erred in permitting the plaintiff to answer over the objection of defendant the following questions: "What had you been working at and what had your pay generally been for?" "You may state if you were able to perform work all the time."

Under the pleadings the evidence was not admissible. There is no allegation in the complaint of any special damage, and no special allegation of damage by reason of the loss of the power to earn money or to follow any particular occupation, or of damage re-

sulting from any inability to perform work. Under the allegations of the complaint there could not be any recovery for permanent disability. In cases like this, damages for interruption of plaintiff's occupation and deprivation of accustomed means of earning support must be specially alleged; that is to say, where damages which are the natural consequence of an act, but not necessarily the result of it, are sought to be recovered, they must be specially alleged in the complaint or no recovery can be had.

Baldwin v. *Western R. R. Co., 4 Gray (Mass.), 333;*
Lowe v. *Archer, 12 N. Y., 277;*
Nunan v. *City of San Francisco, 38 Cal., 689;*
Rice v. *Coolidge, 121 Mass., 393;*
Dabovich v. *Emeric, 12 Cal., 171;*
Burrage v. *Melson, 48 Mass., 237;*

In order that defendant may be prepared with evidence to rebut the proof offered for such damages or amount or extent of them he must be apprised by proper allegation in the plaintiff's pleading.

Shaw v. *Hoffman, 21 Mich., 151;*
Solms v. *Lias, 16 Abb. Pr., 311;*
Barnard v. *Berwind, 7 N. Y., Week. Dig., 519.*

III.

The court erred in giving the instructions set forth in the 12th, 13th, 14th, 15th, 16th and 18th assignments of error. The court first presents a question for determination in the case and then tells the jury that it is their duty to answer that question in the same manner in which the judge of that court would and does answer it; the judge then proceeds to answer the question for the jury. The question put involves an inquiry as to the personal and direct negligence of the defendant, whereas, by the proof and pleadings no such inquiry is raised.

The jury are asked to pass upon the question whether the accident which caused the injury of the plaintiff was the result of negligence on the part of the defendant, its agents or servants, by answering that said accident was the result of such negligence; we might reasonably inquire whose negligence, the defendant's or that of its agents or servants?

The court tells the jury that the mere happening of a collision between the trains of the defendant unexplained, under the circumstances which the undisputed facts of the case show, raises a presumption of negligence which, in the absence of evidence tending to show that the defendant's servants in charge of said train were without fault, would be sufficient for them to base a finding of negligence on. The language of the court assumes that the happening of the collision was unexplained, when, in fact, such explanation is given by the evidence as leaves the defendant without fault, and therefore no such presumption of law as the court mentions could arise from the case. The court further says, that the defendant failed to offer any testimony whatever tending to show that its servants were without fault, but that uncontradicted testimony shows affirmatively that they were grossly at fault. The testimony of the flagman shows that he was as far ahead of his train as it was usual in the case of trains running light, as his train was on that occasion. The court, by subsequent instruction, states that there is dispute in the testimony as to the rate of speed; and there is no evidence in the case to show that the rate of speed was unlawful, dangerous, or excessive. The court further, in the course of this line of instruction, says that the flagging train had no business to be where it was at the time of the collision, and it was thereby placed in a position where it was impossible to

prevent a collision. We contend that the questions presented, namely, the question whether the accident was the result of negligence; whether the happening of the collision was sufficiently explained; whether the testimony shows that defendant's servants were without fault; whether the flagging train was where it had no business to be; whether the negligence was the negligence of the engineer and conductor of a particular train and whether that train was in a position where it was impossible to prevent a collision, were all questions for the jury to determine from the evidence. That the determination of these questions are properly within the province of the jury, is plainly evident from the language of the court, as used in the summing up of all these previous instructions; in the statement that "this was gross negligence on the part of those in charge of the train, and the facts being undisputed, it is the duty of the court to tell you so, and not to confuse you with abstract definitions of negligence, which you may not understand alike, and may, therefore, have difficulty in applying." If the facts were undisputed, and led to but the one conclusion of gross negligence, how would it be possible for the jury to have different understandings as to abstract definitions of negligence in considering the case, or how were they likely to have any difficulty in applying such definitions to such facts? The very fact that the jury might differ in their understanding of definitions of negligence as applicable to the case, or the fact that they might have difficulty in applying such definitions to such facts, would seem to indicate that there was not involved in the case such irresistible conclusions of gross negligence.

When the inference of negligence is to be deduced from the facts and circumstances which the evidence

tends to prove, the drawing of such inference is the province of the jury.

Hopper v. *Chicago, &c., R. R. Co., 21 N. W. Rep., 227;*
Philbrick v. *City of Niles, 29 Fed. Rep., 489;*
Delger v. *City of St. Paul, 14 Fed. Rep., 567;*
Williams v. *Northern Pacific R. R. Co., 14 N. W. Rep., 97.*

The court was not content with telling the jury what the duty of the servants of the defendant was, but he proceeded to tell what said servants in the particular case had done or failed to do. As well might he have followed up his statement as to what would constitute contributory negligence of the plaintiff, by setting forth what he had done or failed to do, and by stating to the jury the conclusion that such was contributory negligence.

Negligence is a question of law and fact; the duty of the party is a matter of law; what has been done by the party is a matter of fact that is to be determined by the jury.

Fuller v. *Citizens, &c., 15 Fed. Rep., 875.*

While the word gross, coupled with the word negligence, has been used in instructions to juries, we don't see any reason for sanctioning the use of that word by a court in directing the jury to find that a particular course of conduct was negligent. If the expression does not add anything, either by way of degree or quantity, to the term "negligence," why the use of it? And if it so adds, why is it not proper for the jury to determine the quality and intensity of the negligence without positive direction from the court? If it characterizes the degree of negligence, it is an improper expression to be used in a positive, direct instruction to a jury, tending to the giving by the jury, in a particular case, of damages much in excess of the amount justified by the proof of injuries. In one of these instructions to which we refer, the court describes one of the trains as being in a

position where it was impossible to prevent a collisoin with the train which came "dashing around the curve with its load of human freight, ignorant of the impending danger." This appears to be an aggregation of highly sensational and tragic statements worked up into a descriptive form, more indicative of a passionate interest, less of calm, deliberate judgment, than any of the statements of the witnesses on the stand.

The court should have instructed the jury fully as to what constituted negligence, and should have given such definitions of negligence and contributory negligence as have received the sanction of courts whose decisions are controlling on the subject; it will be noticed that further along in his instructions the court submits to the jury the questions of contributory negligence of the plaintiff, without submitting to them any definition of the term contributory negligence. To have properly understood their duty in the matter, the jury should have had definitions of both terms. It seems as if the court was of the impression that the jury might not understand alike, and might differently apply, definitions given to them, in connection with matters submitted to them by the court, as entirely within their province to determine.

Kane v. *North, &c., 128 U. S., 91;*
Richmond, &c. v. *Powers, 149 U. S., 44;*
Sullivan v. *Railroad, 154 Mass., 527.*

IV.

The court says to the jury that he does not make mention of the claim of the plaintiff that the Hulett train was running so rapidly at the time of the collision as to make that an act of negligence also, because the rate of speed at which said train was running is in dispute, and negligence in the management of either of the trains is sufficient for the purposes of the case.

Under the view that the court was taking in the case, negligence in the management of either of the trains,

may, perhaps, have been sufficient, but inasmuch as even so slight a reference was made to the speed of one of the trains, some instruction should have been given on the subject. The testimony had gone into the matter of speed with considerable detail. The mere fact that the rate of speed was in dispute was not sufficient to preclude the court from referring to it. When the court tells the jury that he makes no mention of the speed of the train he forgets that he has just finished describing to them how this particular train "came dashing around the curve."

It was the duty of the court, in view of the evidence on the question of speed, to have told the jury that the train going around the curve from the east was not in fault, as no particular rate of speed had been proven as dangerous or unlawful under the circumstances of the case. There was no proof whatever that the rate of speed was excessive or unusual, and inasmuch as the question of speed was referred to at all, the jury should have been told so. No rate of speed of itself, and especially where the rate is not regulated by the statutes, ordinance, or usage, is negligence *per se*.

C. B. and Q. R. R. Co. v. *Harwood, 30 Illinois, 88;*
Moker v. *A. and P. R. R. Co., 66 Missouri, 267;*
McKoukey v. *C. B. and Q. R. R. Co., 40 Iowa, 205;*
G. R. and I. R. R. Co. v. *Huntley, 38 Michigan, 537;*
6 Am. and Eng. R. R. Cases, 124—note;
Pierce on Railroads, 354;
2 Rorer Rail., 551;
2 Wood's Ry. Law, 1097.

V.

The court erred in giving to the jury the instructions set forth in Nos. 19 and 20 of the assignments of error and in refusing the instructions asked for by defendant in error set forth in assignment No. 24. (Rec., 28.) The instructions given were to the effect that while the con-

ductor and engineer were in a sense fellow-servants, they were in another sense agents clothed with the control and management of a distinct department of business, and, therefore, to be treated as personal representatives, for whose negligence an employer was responsible to its subordinate servants, and that, therefore, the defense that the plaintiff was injured by the negligence of his fellow-servants failed. The instruction asked for and refused was in effect that the plaintiff was the fellow-servant and co-employé of the engineers and conductors of the colliding trains, who were engaged in a common employment with him; that if the collision occurred by negligence of either of them and the plaintiff was injured thereby defendant would not be liable. The instructions given did not state the law or rule of decision in force in this Territory on the subject of the liability of a master to one servant for an injury occasioned by another. The instruction refused should, on the other hand, have been given, because the statement of law therein contained is and was the law and rule of decision in force in this Territory, and under such law and rule of decision the defense set up by defendant was fully maintained by the evidence, and the jury should have been so instructed.

There seems to be no legislation in Washington with regard to the liability of an employer for an injury done to an employé by a fellow-servant. The Code of Washington Territory has provided that, in the absence of any such statutory enactment, the rule of decision on the subject is the common law of England. Section 1 of the Code of 1881 of this Territory is as follows:

"The common law of England, so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States and the organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory."

We contend that this means the common law, pure and simple; it does not mean what is commonly known

as the common law of the American States, for no statutory enactment would have been necessary in this Territory to have made that class of common law the rule of decision. That there is a distinction between the common law of the American States and the common law of England will certainly not be denied. In Cooley's edition of Blackstone, 2d ed., vol. 1, p. 67, note 3, we find Judge Cooley says:

"The common law of the American States consists of the common law of England, as modified by English statutes, previous to the colonization of America, so far as it had been found adapted to our altered condition and circumstances; and those English statutes passed afterwards, at any time prior to the Revolution, which were practically accepted and adopted in America, became also part of the American common law."

When the Washington Code speaks of the common law of England it certainly does not refer to the common law mentioned by Judge Cooley in this statement, but it does refer to that common law of England which existed previous to the modification by either English or American statutes. The only exceptions or modifications affecting the condition of such common law are the limitations and modifications mentioned in the particular section of the Code providing for the rule of decision.

It will not be denied that the remedies for civil injuries were in England settled according to general customs or the common law properly so-called. These established customs included established rules and maxims which were known to exist by reason of the records of legal decisions of the Kingdom, touching upon the particular subjects to which they applied. (See Cooley's Blackstone, same edition, vol. 1, pp. 67 to 69, and following; also Kent's Commentaries, 12th edition, vol. 1, p. 468 and following pages.) That the remedies provided

against a master for civil injuries, arising by the negligence of his servants, were matters settled and determined by this common law, as so defined, will not be denied. (See Cooley's Blackstone, same edition, vol. 1, p. 428 and following pages.)

This being true, it only becomes necessary to show that at the common law the master was not liable for injuries received by one servant by the negligence of another.

By reference to the same authority (p. 432, n.) we find that this exemption of the master from liability is as clearly settled and determined by the common law as is his liability in other cases. It is there stated that "the rule that the master shall respond for the negligent acts of his servants is one for the protection of third persons only, and a servant who is injured by the want of care of fellow-servants in doing or omitting to do their portion of the common work can not recover compensation from the master therefor." (See cases cited by Judge Cooley in support of statement made; see also Broom's Commentaries on the Common Law, 4th ed., pp. 707 to 712, inclusive; also Kent's Commentaries, 12th ed., vol. 12, p. 260, note C.

The only qualifications to this exemption from liability, at the common law, were, that the servants should be employed for the same common object, or, as it is sometimes expressed, in common employment, and that a master should not have been negligent in employing incompetent or unskilled servants for the purpose of a particular work, or that the servant should not have been given defective machinery for the prosecution of the work.

In the note in Kent's Commentaries, just referred to, it is said that the test whether the party causing and the party receiving the injury are fellow-servants is said to

be whether they are employed for a common object, not whether they are employed for a common immediate object. In Broom the doctrine is thus stated: "Where, however, servants are engaged not in one common work, but in different departments of duty, the master may be liable in respect of damage done to one servant by another through carelessness or negligence, in the same manner as if the servant injured stood in such relation to him. But workmen don't cease to be fellow-workmen because they are not all equal in point of station or authority."

The decided cases in England have not left us in doubt as to what the common law is on this subject. The first case upon the question was that of Priestly *v.* Fowler, 3 Meeson and Wellsbey, p. 1, decided in 1837. The doctrine was first announced in this country in the Supreme Court of South Carolina in 1841, in Murray *v.* S. C. R. R. Co., 1 McMullen, 385. (See also same case referred to in 36 Am. Dec., 268, and also p. 288.) The doctrine of this case was affirmed by the Supreme Court of Massachusetts, in Farwell *v.* Boston and Worcester R. R. C., 4 Met., 49.

We refer also to the English cases of—

Hutchinson v. *York, Newcastle and Berwick Ry. Co., 5 Exchequer Reports, 343;*

Wigmore v. *Jay, 5 Exchequer Reports, 354;*

Barton's Hill Coal Co. v. *Reed, 3 Macqueen, House of Lords' Cases, 266; 4 Jurist New Series, 467.*

It will be contended that this doctrine, as applied to railway service, is applied with the qualification that the exemption can only exist when the person injured is not subject to the control or direction of the person, for the time being, in the control or having the direction, or the management, or operation of the train; and it will also be contended that the conductor of the train has such

control and direction over the operation of the train, and over the action and movements of the persons upon it, as to make him a vice-principal or personal representative of the corporation or master, and therefore not a fellow-servant with one upon the train, in the service of the company, in a subordinate position.

That this is not the English doctrine and not the doctrine of the English common law, plainly appears from the decided cases. In the case referred to in 5th Exch., 343, it is said that where a servant of a railway company who was proceeding in discharge of his duty, in a train belonging to the company and guided by its servants, was killed by a collision between it and another of their trains, guided by others of their servants, no action was maintainable by his personal representatives against the company; and it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

See Jacob Fisher's Dig., vol. 6, p. 8906.

That the doctrine of common law in England is applicable to a case of exactly the nature of the one at bar, it is only necessary to cite the case of Tunney *v.* Midland Ry., 1 Law Reports, Common Pleas, 281; 12 Jurist, N. S., 691. The following facts appeared: A person was employed by a railroad company as a laborer to assist in loading what is called a "pick-up" train, with materials left by plate-layers and others upon the line; one of the terms of his engagement was that he should be carried by a train from Birmingham, where he resided, and whence his train started, to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train in which he was, through the negligence of the guard

who had charge of it, came into collision with another train and he was injured. Held: That inasmuch as he was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts the master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment.

To show that the facts of the case just referred to are in all material points almost identical with those of the case at bar, we have only to refer to the testimony of H. S. Huson, the engineer in charge of the work, found on page 50 of the bill of exceptions. It is as follows (Rec., 90):

Q. State, if you please, if the plaintiff in this case was employed by you or your company for any purpose under your direction?

A. He was employed as a laborer in the surfacing gang.

Q. Between what points?

A. At that time we were working between Cle-alum and Nelson's; I suppose they were in reality working between Cle-alum and Martin, subject to orders to go to any point between those places.

Q. How were they carried to and from their work?

A. Upon construction train.

Q. Were they charged any fare for their transportation?

A. They were not.

Q. What arrangements were made for that?

A. Nothing but the usual arrangements, that the wages paid included the price for riding on the train to and from work.

Q. These trains that carried them, were they provided for that purpose?

A. Yes.

And on cross-examination the following testimony:

Q. You mean, Mr. Huson, that the wages paid these workmen included the price of their transportation?

A. Understand me, I do not mean to say there is any agreement.

Q. There is an implied understanding that they should be carried backwards and forwards?

A. Certainly. And see Bowman's testimony (Rec., 44, *et seq.*), where he states, positively, that O'Brien was on the train under the direction of the foreman, Abercrombie.

Following these English decisions, with relation to the exemption from liability of the railroad company for injuries received by one servant by the negligence of another, while the former is being carried over the road to or from his work, the carriage being considered part of the compensation for the labor performed, are a large number of American authorities, the leading one of which is Gilshannon *v.* Stonny Brook Ry. Co. (10 Cush., Mass., 228).

But here we can pause, as this court has put at rest this question, as well as the other one, by what law, general or local, it is to be tested (*B. & O. R. R.* v. *Baugh*, 149 U. S., 368), and taking the testimony as hereinbefore noted, this case must fall directly under the ruling in *Baugh's case*;—there can be no escape from it. See our brief in *Hambly's case* (now *cur. adv. vult.*, 187).

For a list of those who are held to be co-servants see Patterson's Railway Accident Law, section 324; also section 435, Wood's Law of Master and Servant (2d edition); see also 7 Am. and Eng. Enc. L., p. 864.

Decided Dec 21st 1893, and is conclusive in this case 154 U.S. 349

It hardly becomes necessary, in the argument of this case, to refer to the fact, that the law presumes the master has done his duty in hiring or retaining a servant, and that negligence in hiring or retaining must be proved. There was no proof in the case, and no attempt to make any proof, that the employés of the company, whose negligence was claimed to be the basis of recovery against the company, were incompetent, or that the company was negligent in hiring or retaining them; but, for reference to the rule on this subject and as to the necessity of proof, see Wood's Law of Master and Servant, *supra*, secs. 419, 420, 422.

VI.

The court instructed the jury that—

"If the caboose was attached to the train for the accommodation of the train men alone, the flat car being provided for the gang of track workmen, or if the servants of the company in charge of the train directed the workmen to take position on the flat car, then they were not guilty of negligence in obeying that direction and riding on said car, and of course the plaintiff being one of said workmen was not guilty of contributory negligence in that particular."

This was error. Any direction of the servants of the company in charge of the train, in the particular mentioned, would not release the person obeying such direction from the effect of his own negligence in doing the act.

The plaintiff was clearly guilty of contributory negligence in taking the flat car instead of riding in the caboose provided for him, which if he had done, he would not have been injured. The case is not taken out of this rule by the fact that the defendant's employés allowed or invited him, or even directed him, to ride on the flat car.

The rule is, that a person can not recover for injuries sustained by the personal negligence of another when he has himself been guilty of negligence but for which the injury would not have occurred. Citation of authorities is not necessary to sustain this proposition. It is stated to show that plaintiff's conduct comes within it. No one on either train except those on the flat car were injured; even the man on the steps of the caboose was not injured. The flat car was the most dangerous part of the train, and the position that plaintiff occupied upon it was the most dangerous thereon. He was, indeed, adding to his danger by the peculiarly unconcerned manner in which he acted and the careless attitude which he assumed.

In the case of Railroad Company *v.* Jones, 95 U. S., 439 (cited in St. Louis, etc., *v.* Schumacher, 239, present term), one of a party of men employed by a railroad company in constructing and repairing its roadway, on returning from work one evening, rode on the pilot or bumper of the locomotive of a train, consisting of a locomotive, tender, and box car, when the train, passing through a tunnel, collided with cars standing on the track and he was injured. There was ample room for him in the box car. All in it were unhurt. 95 U.S. 77

The court was asked to instruct the jury as follows: If the jury find, from the evidence, that the plaintiff knew the box car was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not. This instruction was refused. Upon appeal, the United States Supreme Court held that the knowledge, assent, or direction of the company's agents as to what he did was immaterial; that, as he was not an infant or *non compos*, he might as well have obeyed a suggestion to ride on the cow-catcher

or put himself on the track before the advancing w of the locomotive; that, consequently, his injury was due to his own recklessness and folly. He was himself the author of his misfortune. The evidence was to the effect that it was usual for the company to convey them to and from their place of work. Sometimes a car was used for this purpose; at others only a locomotive and tender was provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of the person in charge of the workmen and the conductor of the train. The plaintiff, on rebuttal, gave evidence tending to show that sometimes the box car was locked when there was no other car attached to the train. It was held that the plaintiff was not entitled to recover, and that the court erred in refusing the instruction. The Supreme Court, in conclusion, said that if the company had prayed the court to direct the jury to return a verdict for the defendant it would have been the duty of the court to give such direction, and error to refuse. This decision is really more applicable to the case at bar than the one in connection with which it was rendered.

In the case of Kresanowski *v.* Northern Pacific R. R. Co., 18 Fed. Rep., 229, the facts are also similar to those of the case at bar:

Plaintiff was employed by defendant, a railroad company, in excavating, and was sent with others to the place of work on an engine provided by the company for that purpose. The tender being full of wood, he, with one or two others, sat on the front of the engine with his feet over the pilot. While proceeding to his work in that position, the engine on which he was riding ran into another engine, and the plaintiff received injuries for which he seeks damages. On motion to the

court to instruct the jury to find a verdict for the defendant upon the ground, with others, that the evidence showed contributory negligence which would bar a recovery, the court, following the law laid down by the Supreme Court in Railroad Co. *v.* Jones, held (1) that the plaintiff himself so far contributed to his injury by his own negligence and want of ordinary care and caution in placing himself in such a dangerous position on the engine of the defendant that he could not recover; and (2) that the plaintiff being of age and able to see and know the risks of the position, even the fact that he had been invited and authorized by the defendant to ride upon the engine would not justify him in his negligence in placing himself in that position of apparent great risk and danger.

95 U.S. supra

The court in the present case, under the authority of the decisions just cited, should have directed the jury to find a verdict for the defendant. But if the court did not do so, because he was not asked to, he ought to have framed his instructions in such a way as to announce the law declared by these authoritative decisions, which he failed to do. If he was not justified from the evidence in saying that the acts of the plaintiff were contributory negligence, there was nothing in it to justify him in saying that there were not.

VII.

The court erred in instructing the jury that the defendant must establish the fact of contributory negligence by a preponderance of the evidence. It is incumbent on the plaintiff to show that he exercised due care. The court says that "if the evidence is so evenly balanced on the question that you can not say that it preponderates in favor of either party, then the plaintiff would be entitled to your verdict."

One seeking recovery from a common carrier for a personal injury must prove not only defendant's negligence, but that he himself did not by his want of care contribute to the injury.

Bonce v. *Dubuque Ry. Co.*, *5 N. W. R*, *177*;
Raymond v. *Burlington and C. Ry. Co.*, *17 Ib.*, *923*;
Teipel v. *Hilsendegen*, *7 Ib.*, *82*;
Pzolla v. *Michigan Central R. R. Co.*, *20 Ib.*, *71*.

Upon the question of the burden of proof of contributory negligence generally, see—

Beach Con. Neg., *sec. 155*.

The decided weight of authority is in favor of the rule, that the burden is upon the plaintiff in these actions to show his own freedom from contributory negligence.

Beach, sup., sec. 156.

But here the plaintiff's own case raised a presumption of contributory negligence.

In such case, even in all jurisdictions where contributory negligence is held to be a defense, the burden of proof is immediately upon the plaintiff, and it devolves upon him, as of course, to clear himself of the suspicion of negligence that he has himself created.

Beach, sup., pp. 432 and 438;

See authorities cited in our brief in *Holmes' Case*, 64 ~~254~~, at this term.

VIII.

The court erred in not instructing the jury, as asked by the defendant, to the effect that there can be no recovery unless negligence of the defendant in the operation of its trains is proved by a preponderance of evidence.

What is said in this connection can as well be applied to the instruction set forth in the thirteenth assignment of error.

The mere happening of an accident is not *prima facie* evidence of the negligence of the employer.

Smith v. *Memphis and L. R. R. Co., 18 F. R., 304.*

The law does not presume or impute negligence or carelessness, but requires it to be shown by him who alleges it, and unless he does show it by a fair preponderance of evidence he can not recover.

Meutzer v. *Armour, 18 F. R., 373;*
Crew v. *St. Louis, &c., Ry. Co., 20 F. R., 87;*
Fuller v. *Citizens' National Bank of Galion, 15 F. R., 875;*
Delger v. *City of St. Paul, 14 F. R., 567;*
Morris v. *Chicago, &c., Ry., 26 F. R., 22;*
Whart. Negl., secs. 421 and 813.

IX.

The court erred in refusing to give to the jury instruction No. 2 asked by defendant. (Rec., 28, 23 assignment.)

This had relation to indications of injury, appearing in September or October, upon the body of the plaintiff, if any such existed, not being evidence that such injury was inflicted or received in the month of April previous.

This was necessary, in order to call the attention of the jury to the fact that it might have been possible, taking into consideration all the evidence, that the injuries testified to as existing at the time of the trial might have been received by reason of other causes than the accident in question.

Three physicians who have given plaintiff care and treatment, and who had made careful physical examinations of all parts of his body, both shortly after the accident as well as several weeks afterwards, testify that there were not present any indications of injuries which one physician, who had nothing to do with his treatment, says he finds to be present upon making an examination six months afterwards. (Rec., 103, 117, 120.)

There can be no doubt upon this record that O'Brien was guilty of such contributory negligence as to defeat his claim to any damages whatever. But if we are in error as to this his verdict is out of all proportion in amount to his actual damage. The testimony of the physicians and others, already reviewed, shows this most plainly, and it is certain his damages are excessive. "It shocks the sense of justice of any reasonable man," and a new trial should be granted for this alone, outside of the many other errors shown.

X.

The road should have been permitted to prove the champertous contract as to bringing this suit. This was a distinct issue in the case under the pleadings (Rec., 17–20), but the court refused to hear testimony as to it, and an exception is properly saved to this ruling. (Rec., 24, assignment 7.)

If the contract was such as was in issue by the complaint, answer, and reply, surely the road should have been allowed to prove it, as that would have, for reasons set forth in the assignment (7), been a good defense to the action.

3 Greenl. Ev., §§ 180–3 (14th ed.);
2 Pars. Cont., x765–6 (7th ed.);
4 Am. and Eng. Enc. L., 68 et seq.;
Burnes v. Scott, 117 U. S., 582;
Propeller Mohawk, 8 Wall., 153.

Very respectfully,

JAMES MCNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

[redacted]

In the

Supreme Court of the [redacted]

October Term, 1904.

NORTHERN PACIFIC R. R. CO.,
Plaintiff in Error,
vs.
DAVID O'BRIEN,
Defendant in Error.

Error to the Supreme Court of the State of [redacted]
[redacted] Supreme Court of the
Territory of Washington.

BRIEF FOR [redacted]

[redacted]
Counsel for Defendant in Error.

[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

NORTHERN PACIFIC R. R. Co.,
Plaintiff in Error,

vs.

DAVID O'BRIEN,
Defendant in Error.

No. 355.

Error to the Supreme Court of the State of Washington, as Successor to the Supreme Court of the Territory of Washington.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

Defendant in error (plaintiff below) brought his action against plaintiff in error (defendant railroad) in the 4th district court of the Territory of Washington for damages for injury through the defendant railroad's negligence. The jury awarded plaintiff $6,000, October, 1887. (R., p. 22.) Defendant carried the case to the Supreme Court of the Territory on writ of error, where judgment below was affirmed, January, 1889. (R., p. 2.) Defendant petitioned for a rehearing, and while the petition (R.,

pp. 3, 138–148) was pending, the Territory became a State, November 11, 1889, and the case passed into the State Supreme Court. That court denied defendant's petition for a rehearing (R., p. 9), who thereupon sued out a writ of error from this court to the State Court to correct the judgment of the Supreme Court of the Territory and the judgment of that court. (R., p. 9.) The question of this court's jurisdiction is discussed in the brief on the motion to dismiss the writ of error. The facts are stated from the opinion of the court below:

"From the *undisputed* evidence in the record before us in this case it appears that in April, 1887, David O'Brien, the defendant in error, was employed by the Northern Pacific Railroad Company, the plaintiff in error, as a common laborer in the work of 'surfacing' its track between Cle-Elum and Martin, in Kittitass County, Washington Territory.

"On the 21st of April, 1877, and for some days before that, this 'surface gang' were engaged at work near a point on the Northern Pacific Railroad about six miles west of Cle-Elum, known as Nelson's siding. For some time previous to the 21st of April the 'surface gang' were taken to their work every morning from Cle-Elum on a gravel train provided for that purpose by the company; were brought back to Cle-Elum at noon for their dinner; after dinner, usually about 12.45 p. m., they were taken to their work again on the gravel train, and at night the same train brought them back to Cle-Elum. On the 20th of April, 1887, the conductor of the gravel train received his usual orders for the next day's work, directing to work between Cle-Elum and Nelson's siding and to look out for trains going east. On the 21st of April another train belonging to the same company, and consisting of a large, heavy engine, intended for mountain work, a tender and box car, was sent out from Easton as a 'wild train,' with orders to flag against the gravel train working between Cle-Elum and Nelson's siding. The engine of the wild train was out of repair, and so badly disabled that it could neither start up nor stop with anything like the promptness of such an en-

gine in good order, and at the time in question was on its way to the company's repair shops at Ellensburgh. The engine was reversing, the tender being in front. By the rules of the company 'flagging against other trains' was required to be done by sending a man ahead of the flagging-train three-quarters of a mile with danger signals, and the person giving the signals was required to locate himself so as to be plainly seen and to make the signals in such a manner as to be plainly understood. The conductor of the wild train sent a flagman ahead, but, instead of keeping the train three-quarters of a mile behind him, the train followed the flagman so closely that they were not to exceed three to five hundred feet from him. About midway between Cle-Elum and Nelson's siding there is a ten-degree curve, on one side of which is the Yakima river, and on the other a rocky bluff of a considerable height; as the flagman turned the western end of this curve, his own train being not more than 300 or 400 feet behind him, he saw the gravel train from Cle-Elum approaching, but owing to the obstructions on the side of the track, which interrupted the view of the engine of the approaching train and the flagman, the signal could not be seen until the train was upon the flagman, and the result was the fatal collision between the two trains. The gravel train consisted of a flat car, which was in front of an engine, and a caboose car. There were about thirty laborers, including defendant in error, upon the flat car. This flat car was driven by the force of the collision into the tender of the engine of the other train; seven men were killed outright, and more or less seriously injured. The defendant in error was hurled from the car by the shock of the collision, falling upon his head upon the rocks upon the bank of the river some fifteen or twenty feet from the track; when found he was unconscious; his head was badly cut, one of his teeth knocked out, his right clavicle was broken; he was badly bruised and lacerated on other parts of his body. The collision occurred between 12.50 and 1 o'clock in the afternoon of the 21st; so far there is no dispute as to the facts. * * * The evidence moreover clearly shows that the flat car was designed for the laborers to ride upon to and from their work, and that the caboose was reserved for the use of

the trainmen. That this disastrous collision was caused by the gross negligence of the conductor and engineer of the train going down to Eliensburgh—that is, the 'wild train'—there can be no doubt whatever. It would be difficult to conceive of a case of more wanton, inexcusable negligence than that of which the conductor and engineer of that train were guilty. They must have known from the time they left Nelson's siding that the gravel train was then on its way from Cle-Elum carrying laborers to their afternoon work, and that the two trains must inevitably meet somewhere on that six-mile stretch. Yet, with this knowledge, and in direct violation of the rules of the company and of ordinary prudence, they ran their train over the sharpest curve on the line, leaving the flagman only three hundred feet ahead of them to warn the approaching train of the danger." (Opinion of Supreme Court of the Territory, R., pp. 3, 4, 5.)

BRIEF.

THE SERVANT, PLAINTIFF IN THE CASE AT BAR, WHEN INJURED, HAD NOT THE POWER OF SELF-PROTECTION AGAINST DANGERS ARISING FROM ABSENCE OF PROPER CONTROL OF THE DANGEROUS AGENCY OPERATED BY THE OWNER AND MASTER FOR THE MASTER'S PROFIT; AND THE RULE IMPOSING THE DUTY ON THE OWNER OF A DANGEROUS AGENCY, IN WHOSE SOLE CONTROL IT IS, TO CONTROL IT WITHIN THE BOUNDS OF SAFETY, IS UNIMPAIRED AND PROTECTS SUCH SERVANT; AND NO CONTRACT CAN BE IMPLIED TO RELIEVE SUCH OWNER OF SUCH DUTY.

(See Assignment of Errors 6 and 8, R., p. 15.)

I.

The General Rule.

Where one owns and uses a thing with the nature and operation of which people are not generally acquainted, and which, when not properly controlled, is dangerous to the public, and the control of which is exclusively in the owner of such thing, or one acting for him, in such case the *value of human life* and the *dangerous character* of the thing make it public policy and create a rule of law

that the owner and beneficiary, and the one having sole control, shall be held to the extremest care which human foresight, skill, and caution can produce, and which is necessary to protect human life from the dangerous thing he has set in operation.

Broom's Legal Maxims, pp. 390–391;
Potter *v.* Faulkner, 1 B. & S., 805;
Shearman & R. on Negligence, secs. 683–691;
Rylands *v.* Fletcher, L. R., 3 H. L., 330;
Dixon *v.* Bell, 5 M. & S., 198;
Horace Smith's Negligence, pp. 142–143;
1 Addison on Torts, p. 23 and note n, and sec. 544.

Nor can the one charged with the *duty* avoid the consequences of non-performance by saying that the default was due to the negligence of an agent to whom he had delegated the duty, because *qui facit per alium facit per se*, and because—

"The maxim of *respondeat superior* is bottomed on this principle: that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." (Hall *v.* Smith, 2 Bing., 160.)

The application of these rules is peculiarly appropriate to carriers of *human life* by the *dangerous agency* of steam, which is exclusively within the control of the person or corporation which sets and keeps it in operation.

In Steamboat *New World v.* King, 16 How., 469, this court said:

"In the Philadelphia and Reading Railroad Company *v.* Derby, 14 How., 485, which was a case of gratuitous carriage of a passenger on a railroad, this court said: 'When carriers undertake to convey persons by the *powerful* but *dangerous* agency of steam, *public policy and safety* require that they should be held to the greatest possible care and diligence. And whether the considera-

tion for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross.' We desire to be understood to reaffirm that doctrine, as resting not only on *public policy* but on *sound principles of law.*"

Philadelphia and Reading Railroad Co. *v.* Derby, *supra;*

Sherlock *v.* Alling, 44 Ind., 184;

Caldwell *v.* New Jersey Steamboat Co., 47 N. Y., 282.

"For the law will (as we have seen), *in tenderness to human life and human limbs*, hold the proprietors liable for the slighest negligence." (Story on Bailments, sec. 601 a.)

The necessity of preserving human life from the dangers of the deadly force which he operates is not imposed upon the carrier by *contract*, which might charge him with the care of one life and not with the care of another. It is an established *general rule.*

Philadelphia and Reading R. R. Co. *v.* Derby, *supra;*

Hannibal, &c., R. R. Co. *v.* Swift, 12 Wall., 262.

It is true that it has usually been urged and frequently ruled that public policy operated to relieve the master from the duty of taking care, as to the *servant*, on the theory that if he were left exposed to dangers he would be more diligent on that account, to the benefit of the public. This assumes a duty to the public on the part of the servant *greater* than is owed by the master, because for negligence by the servant it makes the proper penalty death or maiming by increasing his exposure to these results in order to force him to great diligence, while the master is only exposed, as a penalty for his negligence, to a money loss. This court repudiated this cruel, unjust,

and fallacious reasoning in Chicago and St. Paul R. R. Co. *v.* Ross (112 U. S., 377), and quoted very fully from the opinion in R. R. Co. *v.* Stevens (20 Ohio, 415), and certainly not with disapproval, in which it was said:

"We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, *the care and prudence of the employer is the surest guaranty against mismanagement of any kind.*"

The life of the plaintiff in the case at bar is of the same value before the law as is the life of any other citizen, and the dangerous agency operated by the defendant just as deadly, when not properly controlled, to that life, and public policy and impartial justice enforces the general rule for his protection by exacting from the defendant the greatest human care possible so far as the imposition of weighty damages for any injurious default in furnishing that care will compel the defendant to give it.

II.

THE IMPLIED CONTRACT, OR EXCEPTION TO THE GENERAL RULE.

Now, it has been very generally ruled, both by this court and others, that a *fiction* of the law in certain cases relieves the owner and operator of a railroad from the necessity of seeing to it that his dangerous agency hurts no one—that the protection of the general rule is taken from certain citizens when they serve the railroad.

The *fiction* of the law makes the servant's voluntary act except him from the protection of the general rule. It raises an *implied* contract, a contract *presumed* to exist, by which the servant has agreed to take the risk of the negligence of other servants of the same master engaged in the same work, to whom is delegated more or less control of the dangerous agency.

Substantially no other reason has been assigned. But for his own implied contract the general rule would protect him.

Chicago and St. Paul R. R. Co. *v.* Ross, 112 U. S., 377;

Gardner *v.* Michigan Cent. R. R. Co., 150 U. S., 349;

The Baltimore and Ohio R. R. Co. *v.* John Baugh, 149 U. S., 368;

Farwell *v.* The Boston and Worcester Railroad Corporation, 4 Met., 49;

Hutchinson *v.* York, New Castle, and Berwick Railway Co., 5 Exch., 351;

McNaughton *v.* Caledonian Railway Co., 19 Court of Sess. Cases, 273;

Bartonshill Coal Co. *v.* McGuire, 3 McQueen H. L. Cases.

(*a*) THE LAW WILL NOT LIGHTLY PRESUME THAT A REASONABLE BEING WOULD AGREE THAT THE ONE IN WHOM RESTS THE SOLE CONTROL OF THE DANGEROUS AGENCY AND THE DUTY TO CONTROL IT, SHALL NOT CONTROL IT, AND FURTHER AGREE TO EXPOSE HIMSELF TO ITS DANGERS UNCONTROLLED UNDER CIRCUMSTANCES WHICH STRIP HIM OF THE POWER OF SELF-PROTECTION AGAINST THEM.

In the case at bar the plaintiff, as he sat on the defendant's car, being carried, in a state of perfect inactivity, *to the point where his own work was to begin*, was, in relation to the force or work which injured him and the servant engaged in that work, or a part of that force, whose negligence caused the injury, an absolute stranger, without any power either to control them in their relation to himself or to control himself in relation to them.

Did he agree, in the words of this court, that his "personal safety should be left to the sport of chance or the negligence of careless agents?"

"Implied contracts are such as *reason* and *justice* dictate, and which, *therefore*, the law presumes that every man undertakes to perform." (2 Bl. Com., 443.)

An unreasonable and unjust contract can not be implied.

The reason usually assigned to support the implied contract is the fact that the servant *knows* that there are other servants employed by the master, and that servants are sometimes negligent, and that, they being engaged in the same employment, that negligence is a risk incident to that employment, and, therefore, he agrees to take the risk, and is paid for doing so.

The Farwell Case, and many subsequent ones.

This reasoning does not appear sound. The servant knows at the same time that *masters* are sometimes negligent, and that such negligence is a risk incident to the employment, yet he is never held to agree to accept the risk of the *master's* negligence; though such risk would be slight indeed compared with the risk of negligence of a hundred or so of other men with no substance, and with at least uncertain liability for their negligence (Collis *v.* Selden, L. R., 3 C. P., 495, cited in Addison on Torts, 28), and his meagre wages would much more adequately pay him for taking the risk of the *master's* negligence, who has large interests at stake and a large liability to the public.

There is no reason in his *knowledge* of probable negligence on the part of other employés which *per se* can justly take from him that protection which the value of his life, the deadly agency, and the exclusive control of it in the master declare he shall have; nor can the master be justly relieved of the duty imposed on him to exercise his exclusive control over his dangerous agency, simply because one who knows that it is dangerous agrees to come in such contact with it that he may be injured if it is not properly controlled.

The *passenger*, only equally unable to protect himself, knows that servants may be negligent; *he* knows that the agency he voluntarily places himself in contact with is dangerous; he knows that the servant's negligence is apt to maim or kill him. All this knowledge he has, yet the law on that account does not imply a contract on *his* part that in regard to him the corporation shall not do its duty.

Nor is the money which passes from the passenger to the corporation allowed by public policy, so sacred is human life and safety, to vary the corporation's duty to control its deadly agency. It must do this though the person carried pays nothing.

Philadelphia and Reading R. R. Co. *v.* Derby, *supra.*

The mere existence of a *contract*, by which the servant is to do something for the master (work) and the master is to do something for the servant (pay wages), does not *per se* imply an additional contract. The *passenger* has a contract with the master by which he is to do something for the master (pay him money), and the master is to do something for him (transport him), yet no additional contract is implied.

In The Union Pacific R. R. Co. *v.* Fort (17 Wall., 655), it is held that, notwithstanding the contractual relation of master and servant, the rule of *respondeat superior* properly applies in favor of the servant injured by the negligence of another servant.

It is further strongly held by this court that public policy will not *permit* the carrier, even for a consideration and by *express* contract, to relieve itself of its duty to control its dangerous agency.

New York Central R. R. Co. *v.* Lockwood, 17 Wall., 357;

Grand Trunk R. Co. *v.* Stevens, 95 U. S., 655;

New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How., 344;

Bank of Kentucky *v.* Adams' Express Co., 93 U. S., 174;

York M'f'g Co. *v.* Illinois Cent. R. R. Co., 3 Wall., 107;

United States Express Co. *v.* Kountze, 8 Wall., 342.

Yet this servant, who, from the value of his life and from his helplessness, remains entitled to the same protection, is declared to have relieved the corporation from its *duty*, and to have accepted the risk of the negligence of many irresponsible men, and this because he *knew* that servants might be negligent, and injury to him might follow (as also knew the passenger), and in consideration of a *fictitious* part of his wages, which same condition of irresponsibility on the part of the one having control the law would not permit the *passenger* to bring about at any price.

The reasoning originally advanced to support the implied contract, it is submitted, is not sufficient. There must be something more tangible to induce a reasonable man to voluntarily relinquish any existing protection from such dangers, and something more tangible in the way of justice to support the master in his demand to be relieved of the duty which the value of human life places on him to control *his own profitable dangerous agency.*

(*b*) THE REAL REASON AND THE JUST REASON UPON WHICH THE IMPLIED CONTRACT MAY REST IS—

WHEN A PERSON BECOMES A PART OF THE FORCE BY WHICH A GIVEN PIECE OF WORK IS BEING PERFORMED, AND INJURY RESULTS TO SUCH PERSON FROM THAT FORCE, HE HIMSELF MAY GENERALLY BE CONSIDERED AS INSTRUMENTAL IN INFLICTING THE INJURY.

Such person from being a component part of the machinery, or force, has such intimacy with its various elements, such knowledge of its workings, such familiar-

ity with its possible dangers, that he may reasonably assume the control of it so far as is necessary for his own protection; or, where he can not control it, rely upon his knowledge of it and the fact that it operates under his observation to enable him to step out of danger's way. Not to do so would be to contribute to his own injury.

The result of this is that the master, as to this person, ceases to be the *sole* controller of his dangerous agency, and may justly ask to be relieved of the *duty* imposed on him under circumstances where he necessarily exercises *sole* control, either through himself or agent.

When such a condition exists the servant's implied contract becomes *reasonable*, and the demand of the operator of the dangerous agency to be relieved of liability becomes *just*.

The servant failing to take care of himself, having reasonably full power to do so, and where he was a part of the force in operation, could not reasonably demand that another should be liable for the injurious results.

Where, therefore, the intimacy with the work out of which the injury grows, and with the servant whose negligence causes it, is not such as to permit the injured servant to exercise reasonable power of self protection, the injured servant and the negligent servant are not engaged in the same or "common work." The risk of the negligence of a servant so related to him is not an "ordinary risk" of his employment. Such risk is not within the injured servant's contract of service.

Flike *v.* Boston and Albany R. R. Co., 53 N. Y. 549;

Miller *v.* Union Pacific R. R. Co., 12 Fed. Rep., 600;

McNaughton *v.* Caledonian Railway Company, 19 Court of Sess. Cases, 273;

O'Donnell *v.* Allegheny Val. R. R. Co., 59 Pa. St., 239.

The necessary conclusion from the foregoing is that the plaintiff, when injured, was a passenger with all the rights incident to that character.

Gillenwater *v.* Madison and Indianapolis R. R. Co., 5 Ind., 340;

O'Donnell *v.* Allegheny Val. R. R. Co., 59 Pa. St., 239.

It is submitted that while the proposition has not been laid down in terms—that where the servant does not have the power of self-protection there is no implied contract and, therefore, no exception to the general rule of care which governs the owner, beneficiary, and controller of the dangerous thing—yet the absence or the presence of this power of self-protection has figured in so many of the leading cases, and has been commented upon so generally as having weight in *aiding* in producing the conclusion reached, that there is much authority for making it the controlling element in the case at bar. It became influential when the rule of exception exempting the master from liability to one servant for injury inflicted by the negligence of another, was first applied, and it has remained influential down to the present time. Thus, in Priestley *v.* Fowler (3 Mees. and W., 1), which inaugurated the rule of exception (subsequently so harshly enforced as to necessitate action by Parliament to correct it [1880]), the plaintiff was so intimately related to the van and its overloaded condition as to leave *in him full power of self-protection, which he did not exercise*, and in regard to which Lord Abinger said:

"But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

It is true that in the early case of Farwell *v.* Boston and Worcester Railroad Corporation, the learned judge

held that it was not material that the servant could not "to some extent provide for his own security" (4 Met., p. 60); but that case, though widely followed, does not appear to have been well reasoned, and is, therefore, not weighty authority for the application of the rule of exception as broadly as it is therein laid down. The opinion in that case also held that public policy demanded exemption for the master from liability, in order that the servant might be more vigilant to *protect himself* and so add to the security of all concerned, which this court repudiated in the Ross case. (Such doctrine, however, necessarily implies the *power* to protect himself.) In the latter case, also, the idea of a "distinct department" was indorsed, which in the Farwell case was condemned.

The case of the Union Pacific Railroad Company *v.* Fort (17 Wall., 655) is the first one which appears to have been considered by this court involving the exception to the general rule in favor of the master. While the decision in favor of the servant, Fort, who was injured by the negligence of a fellow servant, was based on other grounds than his inability to control the deadly agency operated by the master, or protect himself, this feature was strongly emphasized.

Mr. Justice Davis, after stating that if the fellow servant's order, which resulted in Fort's injury, had been given to one of mature years *he* might have protected himself by disobeying it, said:

"But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger."

If the plaintiff in the case at bar had had "experience" and had been "familiar with machinery" of running trains, instead of being an unskilled day laborer, his relation to the machinery and the human factors in its operation rendered it impossible for him to use such experience and knowledge for his protection. In the Fort case the court held that the risk was not within the contract of service, and then held the rule of *respondeat superior* applicable; again, being in conflict with the Farwell case, where it was held that the master's liability must rest on his implied contract or not at all.

In the following case of Hough *v.* Texas and Pacific Railroad Company (100 U. S., 213), Mr. Justice Harlan, in stating the rule of exception, said:

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend, or are incident to, the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, *with whose habits, conduct, and capacity he has in the course of his duties an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest.*"

Even in the case of The B. & O. R. R. Co. *v.* John Baugh (*supra*), where the exemption of the master was sustained, the weight of this element was recognized. Mr. Justice Brewer said:

"On the contrary, the *peril* was known and voluntarily assumed. The plaintiff admits in his testimony that he knew they had no right to the track without orders, and that there was a local train on the road somewhere between them and Bellaire; and yet, *with this knowledge*, and without protest, he voluntarily rode on the engine with the engineer."

The distinction between the position of Baugh and that of the plaintiff is sharp. Baugh knew that the en-

gineer was guilty of negligence because it happened under his own observation. From his intimacy with the force being then operated, and with the other factor (the engineer) besides himself in its operation, *after* the negligence had occurred to his knowledge, he knew the peril in which he stood, and had full power to step aside and avoid it. The plaintiff in the case now at bar was as inanimate and helpless for the purposes of protection as a sack of wheat; for injury to the wheat so placed, and only equally helpless, the carrier would be liable to its owner who brought it into contact with the dangerous agency. Is the life of less value than the wheat?

And finally, in the last case (Gardner *v.* Michigan Cent. R. R. Co., 150 U. S., 349), Mr. Justice Fuller says:

"While it is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which are the carelessness of his fellow-servants, with whose habits, conduct, and capacity he has in the course of his duty an opportunity to become acquainted, and against whose neglect and incompetency he may himself take precautions," &c.

III.

THE EMPLOYE CAUSING THE INJURY WAS A VICE-PRINCIPAL.

(See Assignment of Error 5, R., p. 14.)

The negligence causing the injury was that of the conductor and engineer of the train colliding with that on which the plaintiff rode. The company's rule was that "trains are to be run under the direction of the conductor, except when such direction conflicts with these rules or involves risk or hazard, in which case the engineer will be held equally responsible." (R., pp. 6, 86.)

The servant whose negligence caused the injury was

a vice-principal, and his negligence was the master's, and the master is liable.

Chicago, Milwaukee, and St. Paul Railway Company *v.* Ross, 112 U. S., 377.

The fact that the engineer was also negligent does not lessen the master's liability.

"If the negligence of a railroad company contributes to—that is to say, has a share in producing—an injury to an employé, the company is liable, even though the negligence of a fellow servant was also contributory."

Grand Trunk R. R. Co. *v.* Cummings, 106 U. S., 700;

Flike *v.* Boston and Albany R. R. Co., 53 N. Y., 549;

McMahan *v.* Henning, 3 Fed. Rep., 353.

That the negligence was that of the conductor of a train other than the one on which the plaintiff was riding, can only serve to intensify the duty of the master to take care. The plaintiff, from his relation to that train and those running it, had to be protected or be the "sport of chance."

Flike *v.* Boston and Albany R. R. Co., 53 N. Y., p. 555.

That the conductor was so related to the plaintiff that he could not exercise control over the plaintiff, is not material.

Baltimore and Ohio R. R. Co. *v.* John Baugh, 149 U. S., 368.

IV.

CONTRIBUTORY NEGLIGENCE.

(See Assignment of Error 7, R., p. 15.)

It is urged that the plaintiff, by riding on the open car *in front* of the engine, contributed to his injury by

taking a position which would *become* more dangerous than other parts of the train in the event of collision.

Trains are not so customarily in the habit of colliding as to have made it his duty to foresee the collision or guard against it.

Lusby *v.* Atchison, T. & S. F. Ry. Co., 41 Fed. Rep., 181.

The place was reasonably safe if the company exercised ordinary care, and plaintiff was not guilty of any negligence in taking it.

"Persons have a right to proceed to the performance of their duties upon the presumption that others will exercise ordinary care."

Horace Smith's Law of Negligence, p. 245;
Lusby *v.* Atchison, T. & S. F. Ry. Co., *supra;*
Terry *v.* Jewett, 17 Hun., 400; affirmed, 78 N. Y., 345;
Gray *v.* Bell, 5 Am. Rep., 371;
Creed *v.* Penn. R. Co., 17 Abb. L. J., 364;
Willis *v.* L. I. R. R. Co., 32 Barb., 398; S. C., 34 N. Y., 670;
Rounds *v.* D. L. & W. R. Co., 64 N. Y., 129–138;
Carroll *v.* N. Y. & N. H. R. Co., 1 Duer, 571; affirmed in Court of Appeals, 6 Duer, 415.

Front-end collisions are no more to be reasonably foreseen than rear-end collisions, both being of frequent occurrence. Would plaintiff have been guilty of contributory negligence had he taken his place in the car on the *rear end* of the train in the event of collision from that end, and injury?

Finally, if the front open car *was* less safe than the rear car, the plaintiff was ordered on to the front car, being the only car provided for his use, and of a kind commonly so used, by the conductor of the train, the vice principal. (R., pp. 54, 66, 104, 131.)

"The true rule is that if a master or other servant standing toward the servant injured in the relation of superior, or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him (2 Thompson, Negligence, 974–'6)."

Miller *v.* Union Pacific Ry., 12 Fed. Rep., 600;
Thompson, Admr., *v.* Chicago, M. & St. Paul. Ry. Co., 14 Fed. Rep., 566.

The burden of proof was on defendant.

Ind. & St. L. R. R. Co. *v.* Horst, 93 U. S., 291;
Hough *v.* Texas and Pacific R. R. Co., 100 U. S., 213.

In B. & O. R. R. Co. *v.* Jones, 95 U. S., 439, relied on by defendant, no amount of care by the company could have made the pilot of the engine a safe place for transportation. Jones could not reasonably have expected the company to make it safe. He recklessly put his life in jeopardy by putting himself there. The ordinary oscillation of the train kept him in constant peril. He could no more have reasonably expected the company to keep him from injury there than he could have done had he taken his place astride the walking-beam of a steamboat.

V.

ASSIGNMENT OF ERRORS 1, 2, 3, 4, AND 9. (R., PP. 14 AND 15.)

The first four errors assigned are based on the introduction of evidence showing a defect in the engine of the train at fault, owing to which it was more or less uncontrollable. The reason given for the assignment of error is that the allegations of negligence in the complaint are

not broad enough to cover the question of defect in the machinery. The ninth error assigned includes also the refusal of the court to instruct the jury that there could be no recovery unless the negligence of defendant in the operation of the trains was proven by a preponderance of evidence.

1. The occurrence of the accident is *prima facie* evidence of negligence.

Stokes *v.* Saltonstall, 13 Pet., 181.

The accident was not disputed by defendant, or any explanation made thereof, or any evidence as to the competency of the servants, whose acts caused it, offered, or any evidence offered in denial of any of the facts testified to as constituting the negligence.

The *undisputed* facts show such disregard of the rules of the corporation, such wanton, flagrant disregard of human life and safety, and such ignoring of duty born of common prudence and patent to the lowest order of understanding as shocks common sense and the sensibilities of mankind.

The court charged the jury that the *acts of the servants* shown to have produced the accident (undisputed) constituted gross negligence, "and the negligence of the management of the trains is sufficient for the purposes of this case."

It was the court's duty to so instruct.

"When the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the question as a matter of law."

Shear. and Red. on Negligence, sec. 56;
Pleasants *v.* Fant, 22 Wall., 116;
Improvement Co. *v.* Munson, 14 Wall., 448;
Cooley on Torts (2d ed.), 804.

The court gave no instruction as to the defect in the engine. On the whole charge, therefore, upon the question of negligence, irrespective of the evidence as to the defect, the jury was compelled to find for the plaintiff. The exclusion of that evidence could not have changed the result. There is, therefore, no ground for reversal in the first four and ninth assignments.

Cavazos *v.* Trevino, 6 Wall., 773;
Chicago *v.* Greer, 9 Wall., 726;
Brobst *v.* Brock, 10 Wall., 519;
Chicago, M. & St. P. R. Co. *v.* Ross, 112 U. S., 377.

2. The allegations in the complaint fully covered the testimony as to the defect; but if they did not, under the code of Washington the variance was not ground of exception.

"No variance between the allegation in a pleading and the proof shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has so been misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just." (Code of the Territory of Washington, sec. 105.)

Respectfully submitted,

REESE H. VOORHEES,
For Defendant in Error.

February 1, 1894.

Transcripts
of
Records
1894

(909)

Supreme Court U. States
155 U. S.
102 — 141

MAP OF THE

CITY OF SYRACUSE,

--PUBLISHED BY--

ANDREW BOYD,

For The

SYRACUSE CITY DIRECTORY.

Entered according to Act of Congress, in the year 1884, by Andrew Boyd, in the office of the Librarian of Congress at Washington.

Scale of Feet

No. 1208.
Water C.
" Syracuse Stat
b. 393a

TOWN OF ONONDAGA

TOWN OF DEWITT

WOODLAND CEMETERY

ST CECILIA CEMETERY

OAKWOOD CEMETERY

SYRACUSE UNIVERSITY

ONONDAGA LAKE

Onondaga Creek

Erie Canal

N.Y.W.S. & B.RY.

S. & C.V. & R.

I II III IV V VI VII VIII

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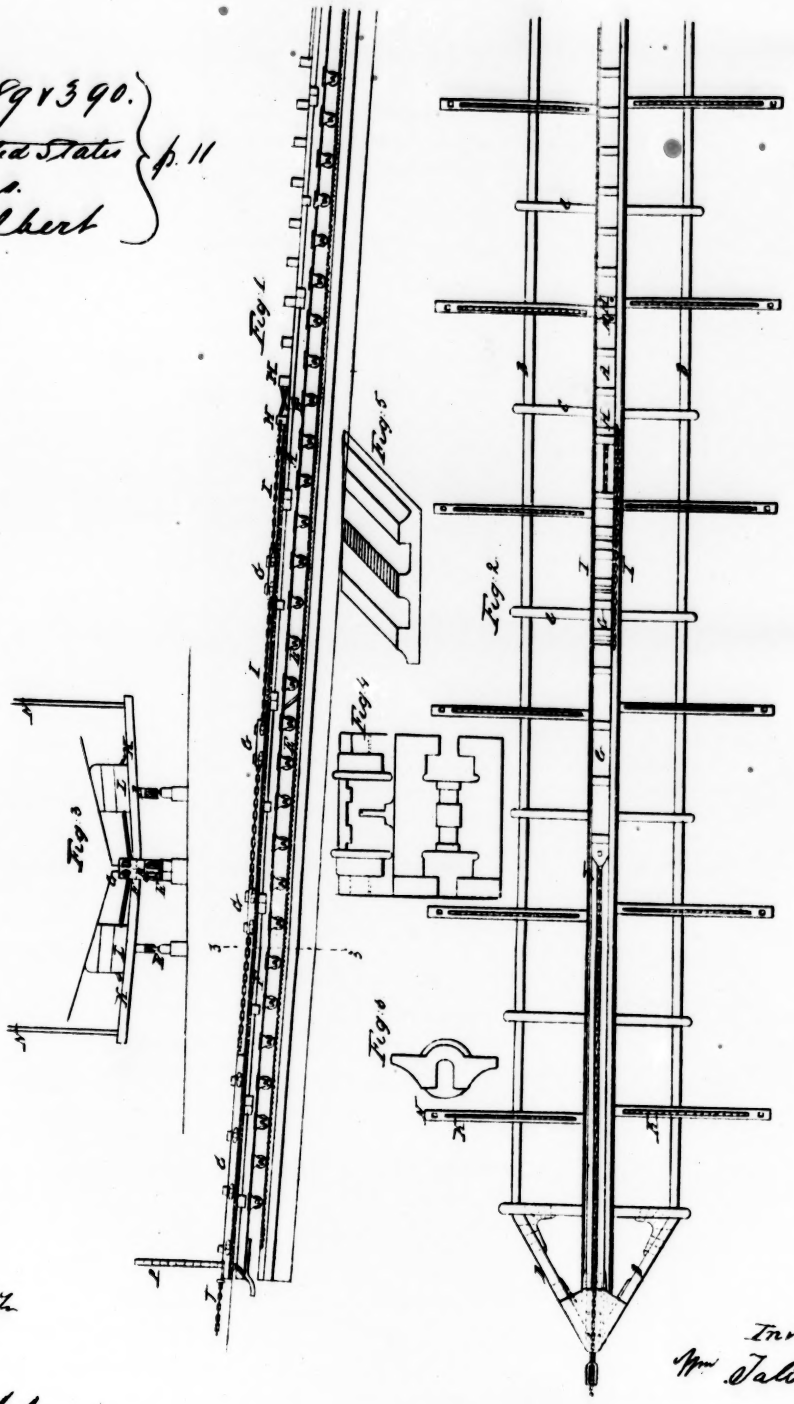
W. Talbot.

Marine Railway.

No. 41,458. Patented Feb. 2, 1864.

Nos. 389 & 390. } p. 11
United States }
Talbert }



Witnesses
J. Dennis Jr.
Wm. Walton

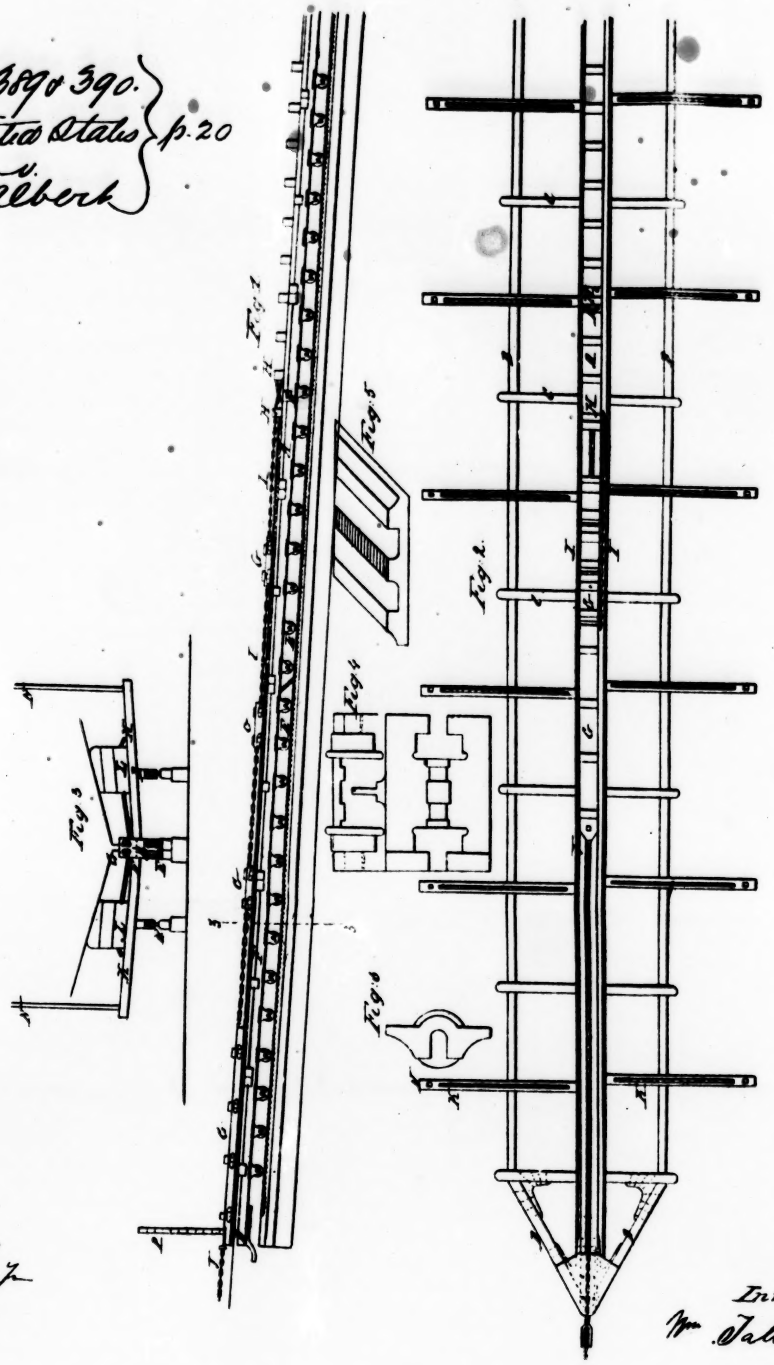
Inventor
Wm. Talbert

Page 11

Marine Railway.

No. 41,458. Patented Feb. 2, 1864.

Nos. 389 & 390.
United States } p. 20
v.
Talbert



Witnesses
J. Dennis Jr.
J. M. Dalton

Inventor
Wm. Talbert.

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Page 26

Nos. 389 & 390
Illustrated No 26
Talbot.

Fig 1

Fig 2.

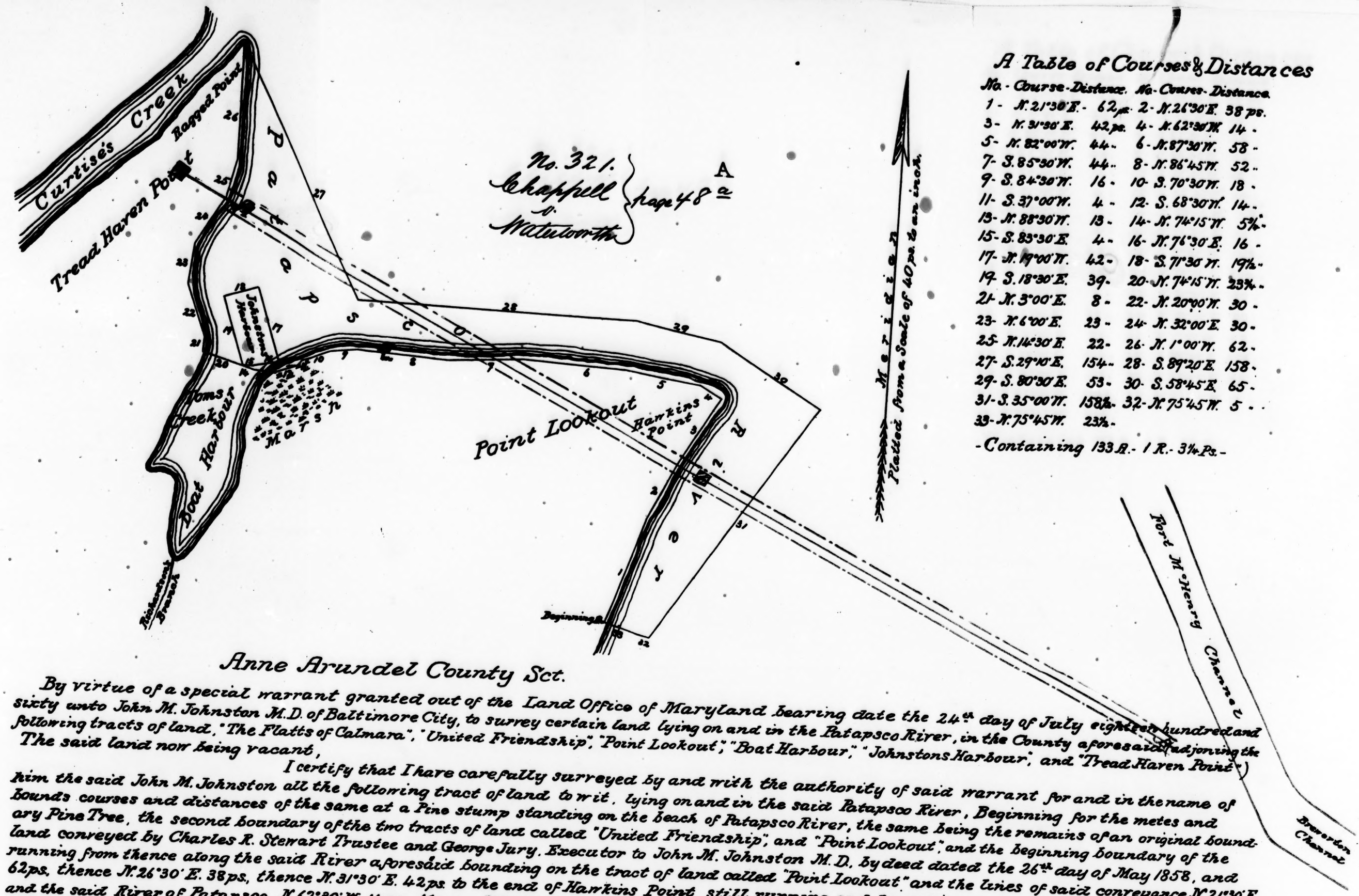
Fig 3

Fig 4

Fig 5

Fig 6

A.D. 1852. Jan 9 N° 76.
TURNBULL & SPENCE, SPECIFICATIONS



A Table of Courses & Distances

No.	Course	Distance.	No.	Course	Distance.
1	N. 21°30'E.	62 ps.	2	N. 26°30'E.	38 ps.
3	N. 31°30'E.	42 ps.	4	N. 62°30'W.	14 .
5	N. 82°00'W.	44 .	6	N. 87°30'W.	58 .
7	S. 85°30'W.	44 .	8	N. 86°45'W.	52 .
9	S. 84°30'W.	16 .	10	S. 70°30'W.	18 .
11	S. 37°00'W.	4 .	12	S. 68°30'W.	14 .
13	N. 88°30'W.	13 .	14	N. 74°15'W.	5¼ .
15	S. 83°30'E.	4 .	16	N. 76°30'E.	16 .
17	N. 19°00'W.	42 .	18	S. 71°30'W.	19½ .
19	S. 18°30'E.	39 .	20	N. 74°15'W.	23¾ .
21	N. 3°00'E.	8 .	22	N. 20°00'W.	30 .
23	N. 6°00'E.	23 .	24	N. 32°00'E.	30 .
25	N. 14°30'E.	22 .	26	N. 1°00'W.	62 .
27	S. 29°10'E.	154 .	28	S. 89°20'E.	158 .
29	S. 80°30'E.	53 .	30	S. 58°45'E.	65 .
31	S. 35°00'W.	158½ .	32	N. 75°45'W.	5 . .
33	N. 75°45'W.	23½ .			

- Containing 133 A. - 1 R. - 3¼ Ps. -

Anne Arundel County Sct.

By virtue of a special warrant granted out of the Land Office of Maryland bearing date the 24th day of July eighteen hundred and sixty unto John M. Johnston M.D. of Baltimore City, to surrey certain land lying on and in the Patapsco Rirer, in the County aforesaid adjoining the following tracts of land, "The Flatts of Calmara", "United Friendship", "Point Lookout", "Boat Harbour," "Johnstons Harbour", and "Tread Haren Point") The said land now being vacant,

I certify that I have carefully surreyed by and with the authority of said warrant for and in the name of him the said John M. Johnston all the following tract of land to wit, lying on and in the said Patapsco Rirer, Beginning for the metes and bounds courses and distances of the same at a Pine stump standing on the beach of Patapsco Rirer, the same being the remains of an original boundary Pine Tree, the second boundary of the two tracts of land called "United Friendship", and "Point Lookout", and the beginning boundary of the land conreyed by Charles R. Stewart Trustee and George Jury, Executor to John M. Johnston M.D. by deed dated the 26th day of May 1858, and running from thence along the said Rirer aforesaid bounding on the tract of land called "Point Lookout" and the lines of said conreyance N. 21°30'E. 62ps, thence N. 26°30'E. 38ps, thence N. 31°30'E. 42ps to the end of Hawkins Point, still running and bounding on the lines of said conreyance and the said Rirer of Patapsco, N. 62°30'W. 14ps, thence N. 82°W. 44ps, thence N. 87°30'W. 58ps, thence S. 85°30'W. 44ps, thence N. 86°45'W. 52ps, thence S. 84°30'W. 16ps, thence S. 70°30'W. 18ps, thence S. 37°W. 4ps, thence S. 68°30'W. 14ps, thence N. 88°30'W. 13ps, thence N. 74°15'W. 5¼ps to the end of the second line of a tract of land in the waters of Patapsco Rirer called "Johnstons Harbour" the said line also bounds on the giren line of a tract of land called "Boat Harbour" which said tract of land lies in the waters of a Creek called Toms Creek, thence bounding on the lines of the tract of land called "Johnstons Harbour" rerverse thereof S. 83°30'E. 4ps, thence N. 76°30'E. 16ps. to the beginning of said tract, still bounding on the lines of said tract rerverse thereof N. 19°W. 42ps, thence S. 71°30'W. 19½ps, thence S. 18°30'E. 39ps to intersect the aforementioned giren line of "Boat Harbour" at the end of the 14th line of this surrey thence bounding on the said giren line N. 74°15'W. 23¾ps. to the place of beginning of the two tracts of land called "Boat Harbour" and "Tread Haren Point" at the mouth of Toms Creek and on the beach of Patapsco River the said last line runs across the mouth of Toms Creek, thence bounding on the said tract of land called "Tread Haren Point", and the Patapsco Rirer N. 3°E. 8ps., thence N. 20°W. 30ps, thence N. 6°E. 23ps, thence N. 32°E. 30ps, thence N. 14°30'E. 22ps, thence N. 1°W. 62ps. to Ragged Point and to the mouth of Curtise's Creek, thence leaving the shore of the Patapsco Rirer and running out into the waters of said, to include the Harbour lying off at the mouth of Toms Creek, running S. 29°10'E. 154ps, said line if continued would strike a Pine Tree and a Persimon Tree on the South bank of the Patapsco Rirer marked with treelve notches each, thence S. 89°20'E. 158ps, thence S. 80°30'E. 53ps, thence S. 58°45'E. 65ps, thence S. 35°W. 158½ps, thence N. 75°45'W. 5ps. to the end of the 6th line of a tract of land called "The Flatts of Calmara" thence running and bounding on the 7th line of said tract N. 75°45'W. 23½ps. to the first place of beginning. — Containing one hundred and thirty three acres, one rood and three and one quarter perches (133 a 1 r 3¼ Ps.) of land more or less. —

There are no improvements.

Surreyed the 1st day of August 1860
By J. Randolph Woodward
S. A. A. County

No 321.
Chappell
to
Watsworth
p 48

Leading Point

Range Light

Drydocks

Drydocks

Proposed Extension

Patapsco River

Wharf

Swampy Ground

840'7

330

690'11

Beginning at a point where the centre line of the light thrown from the Light House situated upon Leading Point, otherwise known as Tread Haven Point. Anne Arundel County, Maryland, and which forms a range light with the Hawkins Point Light for aiding the guidance of vessels navigating the Brewerton Channel, intersects the third line of the property secondly described in the deed from Philip Schaefer & Thomas J Watson, trustees, to Thomas C. Chappell dated August 14 1884, and duly recorded among the Land Records of Anne Arundel County in Liber S.H. No 24 folio 166. being a part of "Point Lookout", and which centre line of light bears from said point towards Leading Point Light House according to Coast Survey Chart of 1886 of Patapsco River and Baltimore Harbor North 69 degrees and 30 minutes West; and running thence due West 690 Feet 11 inches; thence due North 330 Feet to intersect the above mentioned centre line of range light; thence due East 840 Feet more or less to the third line of the lot described secondly in the deed hereinbefore referred to; thence reversing said line and bounding thereon to place of beginning.—

Scale- 40 Feet to one inch.
Simon J Martenet
Surveyor &c
Balto 2-21 1888.

20'

No. 3 &
Chappell
v.
Waterworth
} p. 48 &c.

16

15'

25'

Patapsco

16½

25

Fort McHenry

30

30

Docks

29'

90

5

4

3

2

1

6

7

Light House

31

14'

21

Channel

River

21'

N

S